Benjamin F. Brody

1930 Chestnut Street Apt 19B, Philadelphia, PA 19103 | 512.639.7010 | brodyb@pennlaw.upenn.edu

May 19, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106

Dear Chief Judge Sanchez:

I am writing to request your consideration of my application for a clerkship beginning in fall 2024. I am a third-year law student at the University of Pennsylvania Carey Law School.

As an aspiring litigator interested in public service and committed to a career in Philadelphia, I have developed my research, writing, and analytical skills through work in the community. Prior to law school, I led a team of sixth grade teachers during the COVID-19 pandemic and became interested in issues of accessibility that impact low-income families. That interest has motivated my internships in civil legal aid, where I have researched topics in family and unemployment law and leveraged that research in memoranda and briefs. I have also refined my organizational and editorial skills through coursework in appellate advocacy and a comment on decreasing procedural barriers to pro bono service. I will continue to strengthen these skills in the fall and spring as a Littleton Fellow - a research and writing instructor to first-year students.

I enclose my resume, transcript, and writing sample. Letters of recommendation from Professor Tobias B. Wolff (twolff@law.upenn.edu, 215-898-7471), Professor Amanda Shanor (shanor@law.upenn.edu, 203-247-2195), Professor Sophia Z. Lee (slee@law.upenn.edu, 215-573-7790), and Rachel Miller, Esq. (rmiller@philalegal.org, 215-981-3842) are also included. Brett Sweitzer, my appellate advocacy professor, is also happy to provide a verbal reference (Brett_Sweitzer@fd.org, 215-928-1111), as is Professor Sandra Mayson (sgmayson@law.upenn.edu, 215-495-4642). Please let me know if you would like any additional information. Thank you.

Respectfully,

Benjamin F. Brody

Encls.

Benjamin F. Brody

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EDUCATION

University of Pennsylvania Carey Law School, Philadelphia, PA
J.D. Candidate, May 2024

Honors:	Senior Editor, *University of Pennsylvania Law Review*
	Dean's Prize
Activities:	Nonprofit Board Fellow, McNulty Leadership Program at Wharton
	Executive Board Member, Jewish Law Students Association
	Advocate, Employment Advocacy Project
	Incoming Littleton Fellow

Trinity University, San Antonio, TX
B.A., Political Science and Ancient Mediterranean Studies, *summa cum laude*, May 2020

Honors:	Phi Beta Kappa National Honor Society
	Presidential Award of Excellence
	Pi Sigma Alpha Outstanding Senior in Political Science
Activities:	Founder and Team Captain, Trinity University Mock Trial

EXPERIENCE

Morgan Lewis, Philadelphia, PA — Summer 2023
Incoming Summer Associate

SeniorLAW Center, Philadelphia, PA — September 2022 – December 2022
Extern, Grandparents Raising Grandchildren Project
Researched and composed memoranda on the implications of state and local rules for a revitalized pro bono initiative. Drafted complaints and petitions for clients. Designed pro se and educational resources.

Philadelphia Legal Assistance, Philadelphia, PA — May 2022 – August 2022
Intern, Unemployment Compensation Unit
Counseled clients, crafted trial strategies, advocated in administrative hearings, and authored briefs.

Great Hearts Live Oak, San Antonio, TX — July 2020 – May 2021
Teacher and Sixth Grade Team Lead
Taught History and Literature to eighty-one students. Liaised between faculty and senior administration. Guided team response to COVID-19. Created and implemented hundreds of hybrid lesson plans.

Trinity University Department of Art History, San Antonio, TX — January 2017 – May 2020
Research Assistant
Edited and provided commentary to manuscripts, including the now published *The Ritual Landscape of Persepolis* (University of Chicago, 2017). Analyzed and catalogued clay tablets recovered from Iran.

Texas RioGrande Legal Aid, Austin, TX — May 2018 – August 2018
Intern, Consumer and Elder Law Teams
Defended the need for team funding to TRLA headquarters through an analysis of case intake and resolution data. Produced a website explaining predatory lending practices. Conducted client outreach.

INTERESTS

Science fiction, exploring museums around the world, and walks with my Lab mix.

BENJAMIN F. BRODY
UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

Spring 2023

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Corporations	Michael Knoll	A	3	
Criminal Procedure	Stephanos Bibas	A	3	
Property	Sarah B. Gordon	A-	3	
Independent Study	Tobias B. Wolff	A	3	
Employment Arbitration Bootcamp	Barry Winograd	CR	2	A credit/no credit class
Law Review: Associate Editor	N/A	CR	0	A credit/no credit class

Fall 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Brett Sweitzer	A	3	
Evidence	Sandra Mayson	A	4	
Power, Injustice, and Change in America	Emily Sutcliffe	A	3	
Externship: Senior Law Center	Beth Shapiro	CR	3	A credit/no credit class
Law Review: Associate Editor	N/A	CR	1	A credit/no credit class

Spring 2022

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Amanda Shanor	A+	4	
Criminal Law	Kimberly K. Ferzan	A+	4	
Administrative Law	Sophia Z. Lee	A	3	
Reproductive Rights and Justice	Dorothy Roberts	A	3	
Legal Practice Skills	Chelsea Edwards	H	2	H = Honors
Legal Practice Skills Cohort	Zachary Willis	CR	0	A credit/no credit class

Fall 2021

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Tobias B. Wolff	A	4	
Contracts	Jean Galbraith	A	4	
Torts	Jonathan Klick	A	4	
Legal Practice Skills	Chelsea Edwards	H	4	H = Honors
Legal Practice Skills Cohort	Zachary Willis	CR	0	A credit/no credit class

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 31, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Benjamin Brody

Dear Judge Sanchez:

Ben Brody is a superstar: an extraordinary person with a powerful mind, exquisite writing ability and a gentle, compassionate spirit. He is one of a small handful of the best students I have worked with over the last two years and he will make a treasured addition to any chambers. It is a great pleasure to place my name behind his candidacy. He is a no-risk applicant and well on his way to being one of the top graduates in his class. I give him my strong and enthusiastic recommendation.

Ben was a student in my Civil Procedure class during his first semester of law school. The class was an unusually large one (104 students) but Ben stood out early. He has a powerful intellect and a mature, easy professionalism. And he has a soul. There is a quality of kindness, thoughtfulness and earnestness in Ben that is genuinely remarkable. He came by office hours throughout the semester and made a powerful impression as much for his character as for his extraordinary talent. Ben is the kind of person who fosters trust. As I have gotten to know him better in the year and a half since that first semester, the sense of moral gravitas and intentional caring that he conveys in all he does — his work, his relationships with fellow students, and his devotion to family — has only deepened. I have encountered very few students who make such a powerful impression on the level of pure character.

As Ben's triumphant academic record makes clear, that extraordinary character is combined with an analytical mind of the first order. Ben is certainly one of a tiny handful of the best students currently studying at Penn Law School and the quality of his mind was evident to me from the very start in Civil Procedure. His approach to his work is careful and methodical. Despite his shining success, there is nothing flashy in Ben's manner or in his work ethic. To the contrary, he exhibits a disarming and guileless humility. I am not sure he fully believes the testimony that his record of straight A and A+ grades offers to the extraordinary quality of his talent, but he should. That stratospheric record was an apt reflection of the stellar quality of the work I saw throughout his semester in Civil Procedure. Ben is a natural who takes nothing for granted and works with purpose and joy. It is a wonderful combination of qualities.

Ben has another quality that is rare even among the best students: he writes beautifully. His unedited prose is elegant and natural, smart and well structured, written with economy and confidence, free of flash or clumsiness. I have had two occasions to review his writing and both have been memorable pleasures. The first was in Civil Procedure. I administer a practice exam in that class a little more than halfway through each semester. It is an ungraded exercise taken under serious time pressure that is designed to give both the students and me a chance to see where they are in their effort to master the materials. It is a difficult exercise and students usually do not have any time to spend crafting elegant prose. Ben's practice exam was a singular exception, so much so that I still remember the experience of reading it a year and a half later. Under serious time pressure and faced with a tough analytical challenge, Ben produced a beautiful piece of writing. His answers were excellent substantively and analytically, just as his final exam was, but the elevated nature of his writing was among the best I have ever seen a student produce on this exercise.

The second occasion has been the paper that Ben is writing under my supervision as an independent study. He is doing superb work. Ben identified an important problem in the provision of pro bono legal services: the uncertainty surrounding limited-purpose pro bono appointments. Lawyers in private practice often wish to contribute their efforts and assist indigent clients with discreet legal problems so long as they can do so without taking on a broader set of representational responsibilities that they are not prepared or equipped to assume. The permissibility of such limited-purpose appointments under local ethics rules and the ability of attorneys to rely on courts to respect and enforce the parameters of the appointment are both unclear in many jurisdictions. Ben came to appreciate the importance of the issue from his work at the SeniorLAW Center and Philadelphia Legal Assistance and set out to offer some analysis and guidance. He set out to draw together as much information as he could about the current policies and practices of Pennsylvania state courts on this issue, surveyed the academic literature and best practices in other court systems on the issue, and proposed reforms that would define the ethical obligations of attorneys in this setting more clearly and thus promote the willingness to lawyers in private practice to contribute much-needed representation. I have supervised Ben actively in this work and it has been exemplary at every stage. He conceived the project with maturity and intelligence, put an enormous amount of effort into gathering the necessary information about current practices in Pennsylvania — a task that involved regular communication with clerks of court and judges in counties around the Commonwealth — and then wrote up his analysis and proposals in a beautifully crafted paper. It is certainly in the top category of strongest pieces of student work I have had the opportunity to supervise.

As with everything he does, Ben is approaching the clerkship application process with care and thought. We have spoken a number of times about his interest in clerking, the family obligations that require a narrower geographic frame for his search, and the civic duty that he sees in the role of the clerk. He is going to be a fantastic resource in chambers.

Ben Brody is a superstar. He is also a truly wonderful human being. I hope to have the chance to work with him again in his 3L

Tobias Wolff - twolff@law.upenn.edu - 215-898-7471

year and to find opportunities to collaborate as he enters the profession. By his example, he calls on the people around him to draw on the best parts of themselves. He is a person worth meeting and will be a spectacular clerk for a fortunate judge. I am proud to place my name behind his candidacy.

Please do not hesitate to let me know if I can be of any further help in your review of Ben's candidacy. I can be reached most easily on my cell phone at 415-260-3290 or by email at twolff@law.upenn.edu.

Very truly yours,

Tobias Barrington Wolff
Jefferson Barnes Fordham Professor of Law
Deputy Dean, Alumni Engagement and Inclusion
Tel.: 215.898.7471
Email: twolff@law.upenn.edu

PLA PHILADELPHIA LEGAL ASSISTANCE

718 ARCH STREET, SUITE 300N
PHILADELPHIA, PENNSYLVANIA 19106-1535
TELEPHONE: 215.981.3800
FAX: 215.981.3860
WWW.PHILALEGAL.ORG

April 5, 2023

Re: Benjamin Brody Clerkship Recommendation

To Whom It May Concern,

I write to enthusiastically and without hesitation recommend Benjamin Brody for a judicial clerkship. I had the pleasure of initially meeting Ben when he interviewed for a summer 2022 internship with my office, Philadelphia Legal Assistance, when he was a first-year law student. He immediately impressed me with his passion, humor, and earnestness.

Luckily, Ben accepted PLA's offer and I supervised him closely throughout that summer, where he worked in our small but dedicated Unemployment Compensation Unit. After a brief training, the students took on their own cases, where they assisted claimants at all levels of their unemployment case, including initial applications, payment issues, denial hearings, written appeals, as well as general troubleshooting. Ben's attention to detail, desire to secure a favorable outcome for his clients, as well as empathy for the clients' plights, were a perfect combination. Even when he was working on a case where he had no contact with the client (writing an appeal brief, for instance), his meticulous research and cohesive writing showed that he cared very much about the outcome and desired to do the best work that he could. He (and the clients) were rewarded with many decisions in their favor.

Ben and another student were invited to continue working with us during the school year, through the Employment Advocacy Project (EAP), a program where students take on cases for pro bono credit. Ben kept a few of his summer cases and worked on them between the summer internship and the start of the school year. Unfortunately, due to administrative reasons, he was unable to earn pro bono credit for that work, which disappointed me because I recognize how valuable law students' time is. He took it all in stride, and again reminded me -- through his actions and his attitude -- that he is not one to only do something for credit, and will happily do the right thing simply because it is the right thing. Although the school year began and he no longer had full time hours to devote to this project, his enthusiasm never faltered nor did his level of dedication. I often assigned Ben very complicated cases, cases that I would hesitate to assign to some of the attorneys and paralegals in my unit because of the attention to detail required; Ben was consistently excited for new challenges and I was confident in his skills and knowledge, despite him only having completed one year of doctrinal law classes. His most impressive win was with a client who was not a native English speaker, and had several different issues due to having had to leave several jobs during the applicable time period. Ben was able to successfully navigate a protracted hearing held with an interpreter; the hearing officer must have also recognized the complexity of the case because it took them four to five times the usual amount of time to issue a decision (two months instead of the standard one to two weeks). Ben was incredibly patient and diligent, following up every week to ensure that a decision was issued. He then acted quickly to make sure that the client received their benefits in a swift fashion.

Ben was extremely organized, competent, and thorough in all of his work throughout the year. He was able to pick up complicated concepts very quickly, and was self-aware enough to seek guidance when he felt unsure, after looking to all available resources and trying to problem-solve on his own. He was grateful for any assignment, and had an intellectual curiosity about this area of administrative law that I hadn't yet seen in any law student I had worked with. He was extremely reliable, always promptly responded to communication, and

always met deadlines with time to spare. I look forward to working with him on this project in his final year of law school, and while I personally will be disappointed to no longer be able to work with him upon his graduation, I know he will go on to do great things with his career.

EAP and PLA's client population is better off having Ben participate with us. He is an absolute joy to work with. His work ethic, professionalism, and calm demeanor are unmatched, and would make him an absolute asset as a judicial clerk. If you have any questions, feel free to contact me directly at (215) 981-3842 or by email at rmiller@philalegal.org.

Sincerely,

/s/ Rachel Miller

Rachel Miller
Staff Attorney
Unemployment Compensation Unit
Philadelphia Legal Assistance

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 31, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Applicant Benjamin Brody

Dear Judge Sanchez:

I am writing to enthusiastically support Benjamin Brody's clerkship application.

Ben is a superb student with a dazzling intellect who shone among his class of one hundred and five 1L Constitutional Law students. He has striking intellectual horsepower and is thoughtful, theoretically sophisticated, creative, and analytical. I know he will be an extraordinary law clerk. I hope you give him the opportunity to work with and learn from you.

I had the pleasure of teaching Ben in my Constitutional Law class at the University of Pennsylvania Carey Law School in the spring of his 1L year. I have since gotten to know him as one of his mentors. In those contexts, I've observed both his intellectual prowess, his kindness, and his egalitarian commitments.

The course Ben took with me is a critical introduction to the fundamental concepts and institutions of American constitutional law. In one semester, it covers both structure and rights—and so ranges from separation of powers, federalism, and the role of the courts in the interpretation and enforcement of the Constitution to equal protection and due process. The course aims to convey to students the dynamism and larger arc of American constitutional law, including its history, context, and paths not taken.

Ben was a phenomenal student and hands down not only one of the very top students in my class but in his entire year at Penn Law. It was a joy to teach him, to watch him master a complex set of materials, and to hear his thoughtful observations in every class.

Ben wrote the best exam in his class. It was sophisticated, well-argued, and clearly and beautifully written. It integrated a wide range of cases, history, and ideas, and his answers were crisp, rich, and analytically tight. Ben's issue spotters were exceptional. He masterfully covered a complex array of issues in clear and persuasive prose, noting complexities, nuances, and counter arguments.

Ben wrote his final essay on the role of history and tradition in identifying fundamental rights under the Due Process Clause. He skillfully traced the history of substantive due process, weaving together caselaw and scholarship. He observed, citing Justice Brennan in Michael H., that to the extent history alone governs our fundamental rights analysis, it merely preserves the status quo —a fact that differentially affects those across the socioeconomic spectrum. Ben's essay was also exceptional in the deftness with which he addressed counterarguments and considerations. He addressed the argument that Article V is the best way to effectuate constitutional change. To that counterargument, Ben agreed. Article V amendment is ideal, but also incredibly difficult, he argued, and then he traced various theories articulating why change outside of Article V need not be illegitimate. Unanchored from history, wouldn't fundamental rights analysis be manipulable and perhaps simply reflect the preferences of unelected judges? Ben agreed with that counter argument as well. But the same is true of history and tradition, he argued. While Ben conceded being fearful of the harms of judges unrestrained by history alone, he concluded: "I fear more a standard that seems 'legitimate' in its application, but that effectively allows politics to masquerade as history."

In addition to the final exam, students posted brief memoranda on Canvas several times during the semester. They aimed to raise questions about the assertions and logic of the course materials and opposing students' views, and to draw out larger themes and puzzles from the cases. In these posts and his in-class participation Ben stood out. Every class, he elevated our conversation and brought new, original ideas.

Outside of class, I learned more about Ben, his life, and his goals. Ben grew up Jewish in the rural South, playing football. His sister, Hallie, had a fatal connective-tissue disorder. When Ben was eighteen, he found his sister's body in the bedroom next to his. She was twenty-three. That experience clearly left deep marks on Ben. He says that despite all the physical ills that befell Hallie, she was hopeful. It's very clear that her memory is a guiding light for Ben.

While in college, Ben interned at Texas RioGrande Legal Aid and worked with attorneys fighting false promises and predatory practices that exploited children and those sick or dying. It was there that he decided he wanted to be an advocate, like his parents were for his sister.

This passion for advocating for those in need led Ben to study abroad in Germany to learn about efforts to make prisons more humane and meet and learn from the country's Muslim refugee community. After college, Ben taught sixth grade. And while in law school, he has continued to do direct services work, including through Philadelphia Legal Assistance.

Ben's superb work in my course is not an aberration but his stellar norm. He won the Dean's Award for the highest GPA in his 1L class and is an editor of the University of Pennsylvania Law Review. Not to mention that he is a Nonprofit Fellow in the McNulty

Amanda Shanor - shanor@law.upenn.edu - 215-898-1729

Leadership Program at Wharton, on the Executive Board of the Jewish Law Students' Association, an Advocate in the Employment Advocacy Project, and a Morris Fellow (incoming student mentor).

Ben is also lovely to be around. He is funny, kind, and curious. He is easy to work with and open to feedback and new ideas. He is also exceptionally respectful, including to those with whom he deeply disagrees. Perhaps due to his sister's death and the experiences he sought out since, Ben is also a rare and refreshing combination of intellectual power, humbleness, and gratitude.

I am certain Ben will be an extraordinary clerk. I hope you give him that opportunity.

Please do not hesitate to contact me if I can provide additional information, or if I can be of assistance in any other way.

Sincerely,

Amanda Shanor
Shanor@law.upenn.edu
(203) 247-2195

Visiting Professor, The University of Pennsylvania Carey Law School
Assistant Professor, The Wharton School of the University of Pennsylvania
J.D., Yale Law School, Ph.D., Yale University, B.A., Yale College

Benjamin F. Brody

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WRITING SAMPLE

I wrote the attached merits brief as an assignment for my appellate advocacy course. The prompt was an appeal of a denial of a motion to suppress evidence. By the assignment's instructions, the brief could not exceed thirty pages, and research was limited to a list of nineteen authorities. I have omitted portions of the copy included below for brevity. My professor provided general feedback on the brief, but all edits are my own.

APPEAL NUMBER 17-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

JAMAL BROWN
Appellant

BRIEF FOR APPELLANT

BENJAMIN F. BRODY
Appellate Advocacy Student

TABLE OF CONTENTS

STATEMENT OF THE ISSUES

I.

Whether, at the moment of the traffic stop, police lacked reasonable suspicion the vehicle's occupants had committed credit card fraud - thus requiring suppression of subsequently discovered evidence - given that: 1) police acted on an unreliable tip rooted in secondhand knowledge, and 2) the tip's content unreasonably inferred retail theft from a Black man's apparently lawful conduct.

II.

Whether police lacked reasonable suspicion Mr. Brown was armed and dangerous when they frisked him while investigating credit card fraud, thereby requiring suppression of subsequently discovered evidence.

Preservation of the Issues

Omitted.

STATEMENT OF THE CASE

When police act on a civilian report of "suspicious activity," they face a risk of error. That risk compounds when the civilian's report contains secondhand information, the accused is a Black man, and the accusation infers retail theft from ostensibly lawful conduct. These circumstances are ripe for inadvertent racial profiling, and it falls on officers to ensure their actions comply with the law. Here, officers unreasonably acted solely on such an unreliable and insufficient civilian tip when they initiated the traffic stop that detained Mr. Brown, and they further frisked Mr. Brown without reasonable suspicion he was armed and dangerous. Evidence discovered after the stop and frisk must therefore be suppressed.

A. Officers receive a tip.

At approximately 4:00pm on March 15, 2009, police dispatch received a call from Neiman Marcus Theft Prevention Officer ("TPO") Richard White. Rec. 23, 37, 138. White reported that he was investigating "suspicious credit card activity" at his store, located at "one of the largest malls in the country." Rec. 62, 137. A customer had purchased two Prada purses, left the store, and driven off in a green Ford SUV with New York plates. Rec. 22-23, 39, 114. Then, twelve minutes after the purchase, another customer had attempted to buy one Prada purse, though he left after two of his credit cards were declined. Rec. 113, 128. Both men had presented New York IDs, and both were Black. Rec. 110. White indicated the store "had trouble with credit card fraud with individuals from New York," though many of the store's customers "come from out of state." Rec. 115, 126, 138. White provided the SUV's tag information and said he would meet police officers at one of the mall's crosswalks, where he had lost track of the second customer in question. Rec. 23, 113, 138.

Based on White's report, police dispatch issued a bulletin announcing "suspicious activity involving credit card fraud at Neiman Marcus" and assigned Officers Harris and Burnett to the call. Rec. 36-39, 42, 45, 61, 63. The bulletin did not mention the vehicle observed by White. Rec. 45-46, 138. In the past, Officers Harris and Burnett had responded to numerous calls from the mall, but this was the first report of credit card fraud from TPO White at Neiman Marcus. Rec. 36, 62-63, 112.

The officers met White at the crosswalk, and Harris engaged him in conversation. Rec. 64-65. White reiterated his report to Harris, including a "quick description of the vehicle" and a "brief explanation about the credit card [sic] being declined and both [men] having New York IDs." Rec. 113. He added that, "the last time [they] had a suspicious transaction in the store, [his] supervisor told [him] that there was a New York ID" involved. Rec. 113. White communicated no other reasons for his suspicion to officers - the above description "was just about it." Rec. 114.[1] During this conversation, Officer Harris instructed Officer Burnett to transmit via police radio that 1) "the credit cards were not confirmed stolen" and 2) Harris was looking for the first customer's vehicle as described by White, a green Ford SUV with New York plates. Rec. 40, 43, 65, 100, 138.[2]

[1] Notably, the record contains no evidence that White relayed to police certain information he had received from a sales associate who acted as his "eyes and ears on the shopping floor." Rec. 107. The associate had reported to White that she recognized the first customer from a transaction prior to March 15 she deemed suspicious, that another TPO officer shared her suspicions regarding that incident, and that, on March 15, the customer selected the purses "kind of quick." Rec. 120, 126.

[2] In her own words, Officer Harris wanted to find the vehicle at this point because "[she] didn't know what had happened." Rec. 40.

B. The traffic stop.

Shortly after Officer Burnett transmitted the vehicle's description, another officer, Corporal Donnelly, spotted the car. Rec. 46-47. Corporal Donnelly had heard the initial bulletin announcing suspicious activity at the mall and was driving in that direction when Burnett's description of the vehicle came over the radio. Rec. 45. As Donnelly traversed the mall via "loop road," a two-lane roadway that "loops around the mall," the green Ford SUV came into view. Rec. 47. The vehicle was "driving slowly towards [his] direction." Rec. 47. Corporal Donnelly could not see the occupants due to the vehicle's window tint, but he confirmed the license plate number with dispatch - this was the SUV White had identified. Rec. 47-48.

Corporal Donnelly announced his position over the radio as he followed the vehicle off of loop road and away from the mall. Rec. 49. At approximately 4:11pm, as the SUV entered a ramp towards the Turnpike, Donnelly initiated a traffic stop by activating his lights and siren; the "operator of the vehicle immediately pull[ed] the vehicle to the side of the road." Rec. 49-50. Because he was unable "to see clearly" through the tinted windows, Donnelly momentarily waited for backup before approaching on foot. Rec. 50.

Officers Harris and Burnett were still with TPO White when Corporal Donnelly's dispatch came over the radio. Rec. 40-41, 66. At that point, Officer Harris ceased her questioning, and she and Burnett drove toward Donnelly's location. Rec. 41, 66. Harris and Burnett arrived "almost simultaneously" with Donnelly's traffic stop, and all three approached the vehicle - Donnelly on the driver's side and Burnett and Harris on the passenger's side. Rec. 51, 66. Donnelly observed that there were three passengers in the vehicle and made verbal contact with the driver, co-defendant Dobbs, who provided identification and a valid registration. Rec. 51-52. Meanwhile, Harris and Burnett engaged the front seat passenger, co-defendant

Washington, and the rear passenger, defendant Jamal Brown. Rec. 52, 67. All three of the vehicle's occupants were Black men. Rec. 137.

C. The frisk.

As Officer Burnett approached the vehicle, he observed through the tinted window that the backseat passenger, defendant Brown, "was moving around." Rec. 67. Once he was "right up on the car," Burnett saw Brown bend down, as if to "retrieve something" or "stuff something underneath the seat." Rec. 67, 101. Afraid Brown was reaching for a weapon, Burnett immediately opened the rear door. Rec. 95. Burnett saw that Brown "had his right hand down near his feet" such that it was "like slightly out of view." Rec. 96, 101-102. Burnett grabbed Brown and ordered him out of the vehicle, and Brown immediately complied. Rec. 67. With Brown removed, nothing in his hands, Burnett "took him to the rear of the vehicle" and conducted a pat-down search for weapons. Rec. 96. "Just after [he] started the pat-down," Burnett noticed several video-game consoles and women's pocketbooks in the vehicle. Rec. 67.

Burnett's pat down did not uncover any weapons, nor were weapons found inside the SUV. Rec. 72-75, 96. Nothing at all was found in the backseat, where Brown had been sitting. Rec. 72. Burnett's pat down did uncover, however, two credit cards and a driver's license in Brown's sock. Rec. 67. Burnett showed the cards to a detective who had arrived at the scene, the detective identified the cards as counterfeit, and Brown was placed under arrest. Rec. 68-70.[3]

D. Procedural history.

On this record, defendant Brown motioned to suppress all physical evidence recovered in connection with his arrest on March 15, 2009. Rec. 5, 29-21. Brown asserted

[3] After Brown's arrest, officers retrieved additional evidence not relevant to this appeal by searching the front seat of the vehicle and co-defendants. Rec. 73, 75-76, 83-87.

that officers lacked reasonable suspicion for both the traffic stop and the frisk. Rec. 27. The district court denied the motion on June 18, 2010. Rec. 20. Brown was subsequently convicted of conspiracy, use of a counterfeit access device, and attempted use of an unauthorized access device, among other charges. Rec. 12-13. Brown was then sentenced to thirty months imprisonment and three years supervised release. Rec. 14-15. Brown appealed the judgment on April 25, 2011. Rec. 11.

SUMMARY OF ARGUMENT

Two constitutional violations require suppression of evidence in this case. First, police officers lacked reasonable suspicion for the traffic stop in that they acted solely on an unreliable and substantively insufficient civilian tip. When TPO White contacted police, he made clear that his report was rooted in secondhand knowledge: he had not witnessed many of the events in question, and his accusations relied heavily on conduct *other* civilians had deemed "suspicious." By acting on this tip absent their own independent observations, officers replaced what should have been an investigation with a game of telephone. And, without the external check of a police officer's expertise, White's unreliable information led to allegations not based in fact. That is, in the face of generalized suspicion and racialized inferences, White's report unreasonably read evidence of criminal activity into the ostensibly legal conduct of two seemingly unrelated Black men.

Second, Officer Burnett frisked Mr. Brown without reasonable suspicion Brown was armed and dangerous. Though Brown bent at the waist while inside the SUV, Burnett's subsequent observations revealed Brown was compliant and empty-handed. Caselaw illustrates more is required for reasonable suspicion of weapons possession. Even if Burnett suspected Brown of retail credit card fraud, a strained inference on these facts, suspects of nonviolent crimes are presumably unarmed, particularly where, as here, officers have little reason to think otherwise.

ARGUMENT

I. At the moment of the traffic stop, police lacked reasonable suspicion the vehicle's occupants had committed credit card fraud - thus requiring suppression of subsequently discovered evidence - given that: 1) police acted on an unreliable tip rooted in secondhand knowledge, and 2) the tip's content unreasonably inferred retail theft from a Black man's apparently lawful conduct.

Standard of Review

Faced with a denial of a motion to suppress, this Court reviews the district court's factual findings for clear error and exercises plenary review over questions of law. *United States v. Brown*, 448 F.3d 239, 245 (3d Cir. 2006).

"[R]easonable-suspicion determinations" are questions of law. *United States v. Arvizu*, 534 U.S. 266, 275 (2002). Because Mr. Brown challenges only the district court's reasonable suspicion determinations, and not its factual findings, review is plenary.

Discussion

The Fourth Amendment prohibits unreasonable searches and seizures by law enforcement, including seizures in the form of "brief investigatory stops of persons or vehicles." *Id.* at 273; *Terry v. Ohio*, 392 U.S. 1, 8 (1968). A warrantless seizure is typically unreasonable, though *Terry* created a narrow exception to this rule. *See Brown*, 448 F.3d at 244; *Terry*, 392 U.S. at 30. Under *Terry*, police may constitutionally initiate an investigatory stop only if they "reasonably suspect criminal activity may be afoot." 392 U.S. at 30; *Arvizu*, 534 U.S. at 273. Reasonable suspicion requires less than probable cause, but officers must nonetheless have a "particularized and objective basis" for their suspicions. *Navarette v. California*, 572 U.S. 393, 396-97 (2014) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). Courts assess reasonable suspicion under the totality of the circumstances but consider only those facts known

by officers at the moment of a seizure. *See Arvizu*, 534 U.S. at 273; *Brown*, 448 F.3d at 245. Where one officer conducts a stop based on another's radio bulletin, the government must show that the officer who issued the bulletin had reasonable suspicion. *Brown*, 448 F.3d at 248. And, where officers act based on a tip, reasonable suspicion depends on the tip's reliability and content. *Navarette*, 572 U.S. at 397-98.

Because Corporal Donnelly stopped the SUV pursuant to a bulletin issued by Officer Harris, the ultimate question here is whether, based on White's tip, Harris reasonably suspected criminal activity at the moment of the stop.[4] Rec. 40, 65. Harris lacked reasonable suspicion because 1) White's tip was unreliably rooted in secondhand knowledge from a supervisor and colleague, and 2) the tip's content unreasonably inferred retail theft from a Black man's ostensibly lawful conduct. Evidence discovered after the stop must therefore be suppressed.[5]

A. Police acted on an unreliable tip rooted in secondhand knowledge.

Even a known informant's report may prove unreliable. *Brown*, 448 F.3d at 248-50. To assess a known tipster's reliability, this Court may "borrow underlying principles from the anonymous tip context." *Id.* at 249. These principles include evaluating the informant's "honesty" and "the basis of his knowledge." *Id.* at 249. Honesty alone does not suffice; reasonable suspicion requires "reason to believe not only that the [tipster] was honest but also that he was well informed." *Id.* at 250 (quoting *Alabama v. White*, 496 U.S. 325, 332 (1990)).

[4] Though Officer Burnett broadcast the SUV's description, he did so only at Harris's direction such that her perspective is the relevant point of inquiry. Rec. 65, 100.
[5] Donnelly's stop of the SUV indisputably amounted to a seizure of Mr. Brown. Police effectively seize "the driver and all passengers" for the duration of a traffic stop. *See Arizona v. Johnson*, 555 U.S. 323, 327, 332 (2009); *United States v. Mosley*, 454 F.3d 249, 256 (3d Cir. 2006).

Because crucial elements of White's report relied on secondhand information, his basis of knowledge was insufficiently reliable to generate reasonable suspicion.

Although courts sometimes ask whether a tip is contemporaneous, or relayed face-to-face, in assessing a tipster's honesty, these considerations are irrelevant here insofar as Mr. Brown does not contest the sincerity of White's report. *See Navarette*, 572 U.S. at 398-400 (finding that contemporaneous tips increase the likelihood a tipster is "telling the truth"); *Brown*, 448 F.3d at 249 (reasoning that tips relayed face-to-face allow officers to "appraise the witness's credibility through observation").

Unlike contemporaneity or an in-person report, whether an informant witnessed criminal activity firsthand may "lend[] significant support" to his basis of knowledge. *Navarette*, 572 U.S. at 399. Indeed, where the existence of reasonable suspicion is a "close case," an informant's eyewitness status may tip the scales. *See, e.g.*, *id.* at 401, 404 (asserting an informant's firsthand knowledge differentiated this case from others where reasonable suspicion was not found). A tipster's *lack* of eyewitness knowledge raises particular concern in that it may cause him to report suspicions "not based in fact." *Brown*, 448 F.3d at 241, 250 (finding a caller's suspicions were not based in fact where 1) the caller stated two Black men looked like suspects in a previous robbery, but 2) the caller had not personally seen the crime and knew only the suspects' "general description" and clothing). Officers may discern an informant's tip contains secondhand knowledge absent his express declaration to that effect. *See id.* at 250 (reasoning that a "trained officer" can infer, from the context of a report, whether a reporter possesses firsthand knowledge).

Here, based on the facts as they were presented to Officer Harris, key elements of White's report were secondhand such that he lacked the requisite basis of knowledge for

reliability. Rec. 113, 120, 126. White observed the first customer depart in an SUV, and he followed the second customer to a crosswalk outside of the store, but his accounts of the first customer's purchase, the second's failed transaction, and the alleged prior suspicious activity were secondhand. Rec. 22-23, 110, 114, 120. Like the caller in *Brown*, Whites' knowledge of the alleged criminal activity - the purchase and failed transaction - was necessarily limited insofar as he relied on a sales associate's observations from the shopping floor. Rec. 107. In addition, according to White's report, this activity was primarily suspicious in light of a prior incident involving a "New York ID." Rec. 113. But White explicitly communicated to Officer Harris that he was not affiliated with that incident; he learned of it from his supervisor. *Id.* White's failure to identify the timing of the prior incident, or to describe the customer involved, illustrated for officers the gap in his basis of knowledge. Rec. 121.

A trained officer should have reasoned that White, like the caller in *Brown*, was making accusations based only a "general description" of prior activity. *Id.*[6] Together, as in *Brown*, these deficiencies in White's information unreliably led to assumptions based on secondhand knowledge rather than fact, thus cutting against reasonable suspicion.

B. The tip's content unreasonably inferred retail theft from a Black man's apparently lawful conduct.

Omitted.

C. Evidence discovered as a result of the stop must be suppressed.

Omitted.

[6] Though White possessed some additional information regarding the prior incident, that knowledge is irrelevant to a reasonable suspicion analysis given that he did not communicate it to police. Rec. 107, 120, 126.

II. Alternatively, police lacked reasonable suspicion Mr. Brown was armed and dangerous when they frisked him while investigating credit card fraud, thereby requiring suppression of subsequently discovered evidence.

Standard of Review

Omitted.

Discussion

Omitted.

A. Mr. Brown's behavior did not indicate that he was armed.

Omitted.

B. Neither presence in a suspected vehicle nor suspected participation in retail credit card fraud suggest possession of a weapon.

Omitted.

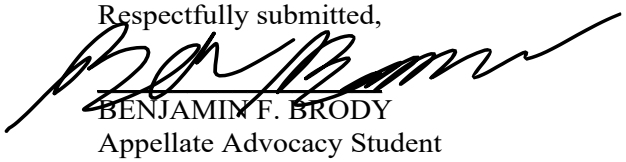
C. Evidence discovered as a result of the frisk must be suppressed.

Omitted.

CONCLUSION

For the foregoing reasons, the district court's judgment should be vacated, and this case should be remanded with instructions to grant the motion to suppress all evidence gathered during, or as a result of, the stop and frisk of Mr. Brown on March 15, 2009.

Respectfully submitted,



BENJAMIN F. BRODY
Appellate Advocacy Student

Applicant Details

First Name	**Kelsey**
Middle Initial	**M**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
Email Address	**kmb9591@nyu.edu**
Address	**Address** Street **119 Prospect Park W** City **Brooklyn** State/Territory **New York** Zip **11215** Country **United States**
Contact Phone Number	**4046986318**

Applicant Education

BA/BS From	**Vanderbilt University**
Date of BA/BS	**May 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Arons, Anna
anna.arons@nyu.edu;aronsa@stjohns.edu
530-574-6790

Murray, Melissa
melissa.murray@nyu.edu
(212) 998-6440

Gottlieb, Christine
gottlieb@mercury.law.nyu.edu
212-998-6693

This applicant has certified that all data entered in this profile and any application documents are true and correct.

June 12, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

My name is Kelsey Brown, and I am a rising third-year law student at New York University School of Law, where I am an Online Editor for the *NYU Law Review*. I am writing to apply for the 2024-2025 clerkship in your chambers, or any subsequent year. Your background in public interest reflects my own commitment to advocating for marginalized communities and increasing their access to justice. As a Black woman dedicated to public service, I would be especially honored to clerk in your chambers.

During law school, I have been proactive in gaining skills that make me confident that I would meaningfully contribute to your chambers. My experiences touch a range of civil rights issues, reflecting my passion for using the law creatively to address systemic injustice. Prior to law school, I worked in reproductive and gender justice community education at the Margaret Cuninggim Women's Center at my university and in voting rights advocacy in the South at Fair Fight Action. During my 1L summer, I interned at the American Civil Liberties Union Reproductive Freedom Project. There, I provided research support for their Georgia team as they filed a state constitutional challenge to Georgia's abortion ban and continued their federal litigation against Georgia's fetal personhood amendment. As such, I strengthened my ability to synthesize caselaw so that my supervising attorneys could make strategic litigation decisions. In the NYU Family Defense Clinic during my 2L year, I represented two parents accused of neglect in their family court proceedings. I filed numerous motions on their behalf, sharpening my ability to write in a succinct manner that effectively advocated for their needs. As a result of my team's efforts, my client's two children safely returned home after years in foster care. I am currently interning at Planned Parenthood Federation of America, where I am working on pivotal constitutional law cases in state court. On account of these experiences, I have developed a firm grounding in legal research and fine-tuned my ability to use case law to answer nuanced legal questions.

My resume, unofficial law transcript, and writing sample, which I prepared in my legal writing class, are submitted with this letter. I have also included recommendations from Professor Melissa Murray, who I worked for as a research assistant, Professor Christine Gottlieb, my Family Defense supervisor, and Professor Anna Arons, who I work closely with for the Parent Legislative Action Network. They can be contacted at the following:

Professor Melissa Murray: melissa.murray@nyu.edu; 212-998-6440
Professor Christine Gottlieb: gottlieb@mercury.law.nyu.edu; 718-374-1364
Professor Anna Arons: aronsa@stjohns.edu; 530-574-6790

Thank you for your consideration.

Respectfully,

/s/ Kelsey Brown
Kelsey Brown

KELSEY BROWN

kmb9591@nyu.edu
404-698-6318

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Honors: Root Tilden Kern Jacobson Scholar for Women, Children, and Families
NYU Law Review, Online Editor
NYU Clerkship Diversity Program
Activities: Research Assistant for Professor Melissa Murray
If/When/How Lawyering for Reproductive Justice, 2022-23 Co-President
Black Allied Law Students Association, Member
OUTLaw, Member

VANDERBILT UNIVERSITY, Nashville, TN
BA in Political Science and Sociology, *magna cum laude*, May 2021
Culminative GPA: 3.927
Honors: Chancellor Scholar

EXPERIENCE

PLANNED PARENTHOOD FEDERATION OF AMERICA, New York, NY
Public Policy Litigation & Law Legal Intern, May 2023 - July 2023
Wrote memoranda on legal issues arising in state abortion challenges. Directly supported the Montana litigation team on constitutional challenges to statutes limiting Medicaid coverage of medically necessary abortions.

BROOKLYN DEFENDER SERVICES, Brooklyn, NY
NYU Family Defense Clinical Student Advocate, August 2022 - May 2023
Represented two clients whose children were removed from their care in Family Court. Researched connections between reproductive rights and the family regulation system for Parent Legislative Action Network.

AMERICAN CIVIL LIBERTIES UNION, New York, NY
Reproductive Freedom Project Legal Intern, June 2022 - August 2022
Wrote memoranda on constitutional rights and civil procedure. Participated in Georgia litigation team meetings and client advisement meetings. Provided research support for state constitutional challenge to Georgia's abortion ban.

FAIR FIGHT ACTION, Atlanta, GA
Voter Protection Fellow, April 2021 - October 2021
Documented voter's experiences at the polls to ensure their voices were included in litigation and advocacy strategies. Onboarded declaration volunteers and facilitated trainings. Researched voter suppression in the South.

AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, Atlanta, GA
Reproductive Rights and Justice Intern, May 2020 - April 2021
Created Reproductive Justice Learning Hours, a bi-monthly political education group. Developed a comprehensive syllabus of articles addressing Reproductive Justice. Attended hearings on Georgia's abortion ban and Medicaid.

DEKALB COUNTY SOLICITOR-GENERAL'S OFFICE, Atlanta, GA
Communications Intern, May 2019 - July 2019
Shadowed prosecutors in misdemeanor court hearings. Managed official Solicitor General Twitter and Facebook. Developed stakeholder and donor lists. Curated sponsorship letters for community engagement events.

ADDITIONAL INFORMATION

Created a Reproductive Justice Blog that offered pamphlets about Reproductive Justice issues which can be viewed at: reproductivejusticetoolkit.wordpress.com (materials last updated in 2021). NYU Pro-Bono Scholar 2024.

Name: **Kelsey M Brown**
Print Date: **06/01/2023**
Student ID: **N16286575**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Anna N Roberts			
Torts	LAW-LW 11275	4.0	B+
Instructor: Daniel Jacob Hemel			
Procedure	LAW-LW 11650	5.0	B
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Sarah E Burns			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Faraz Sanei			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Sarah E Burns			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Family Defense Clinic Seminar	LAW-LW 10251	4.0	A
Instructor: Christine E Gottlieb, Nila Amanda Natarajan			
Family Defense Clinic	LAW-LW 11540	3.0	A
Instructor: Christine E Gottlieb, Nila Amanda Natarajan			
Evidence	LAW-LW 11607	4.0	B+
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Melissa E Murray			
Reproductive Rights and Justice: A Comparative Perspective Seminar	LAW-LW 12768	2.0	A
Instructor: Chao-ju Chen			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Family Defense Clinic Seminar	LAW-LW 10251	4.0	A-
Instructor: Christine E Gottlieb, Nila Amanda Natarajan			
Employment Law	LAW-LW 10259	4.0	B+
Instructor: Cynthia L Estlund			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Trisha Michelle Rich			
Family Defense Clinic	LAW-LW 11540	3.0	A
Instructor: Christine E Gottlieb, Nila Amanda Natarajan			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Melissa E Murray			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	58.0	58.0

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

NYU LAW

ANNA ARONS
Acting Assistant Professor
Lawyering Program

Impact Project Director
Family Defense Clinic

NYU School of Law
245 Sullivan Street, C24
New York, NY 10012-1301
P: 212 992 6152
M: 530 574 6790
anna.arons@nyu.edu

May 31, 2023

RE: Kelsey Brown, NYU Law '24

Your Honor:

I write to recommend Kelsey Brown for a clerkship in your chambers. I have worked closely with Kelsey over the last year in my capacity as the Impact Project Director of NYU's Family Defense Clinic, as I supervised her on a project working with a coalition that seeks legislative change. Through this experience, I know Kelsey to be a curious and critical thinker, a deft researcher and clear writer, and diligent and self-motivated in all that she does. I am confident that she would bring these same outstanding qualities to a clerkship and I recommend her without reservation.

The NYU Family Defense Clinic represents parents facing child welfare cases, striving to protect and expand the due process rights of families and to advocate for services to which families are entitled. Centering the reality that the overwhelming majority of families affected by the child welfare system in New York City are poor and Black or Latinx, the Clinic works through both direct representation and systemic advocacy to combat the indignity and inequality routinely experienced by parents involved with the child welfare system. All clinic students represent individual clients in direct-representation cases in family court, itself a time- and emotionally-intensive undertaking. In addition to this work, students may also volunteer for additional projects, such as working with faculty and community activists on projects designed to transform child welfare policy and practice on a systemic level. In all of this work, the Clinic seeks to empower students to take the lead in all aspects of their casework.

In Fall 2022, Kelsey volunteered for an additional project, on top of her casework. The project entailed working with members of the Parent Legislative Action Network ("PLAN")—a coalition committed to ending the harms of the child welfare system and transforming the way society supports families—to study the relationship between reproductive justice and the child welfare system, with an eye toward writing a report to highlight the ways in which limits of reproductive choice are closely connected to the government's regulation of poor families and Black and Latinx families through the child welfare system. I supervised Kelsey's work on this project from Fall 2022 to Spring 2023. For the duration of the fall semester and throughout the spring semester, I met with Kelsey for individual supervision on a monthly basis and for substantive meetings with other PLAN members on a biweekly basis. Thus, I was lucky to have an extensive view into Kelsey's outstanding work.

Kelsey's work on this project has required flexibility, initiative, and an ability to navigate working within a group run by consensus. Kelsey joined a working group of approximately five members of PLAN, all of whom have different personal and professional backgrounds. The PLAN members had already begun conceptualizing this project but it was still in nebulous form. Kelsey jumped in immediately and enthusiastically. From her first meeting with the PLAN members, Kelsey found a good balance between sharing her own ideas and leaving space for others to speak up as well, and volunteering to take on new tasks but not taking over. Over the course of the year, Kelsey has done factual research into the number of abortions reported in states across the country, tracked access to abortions in those states, and surveyed media accounts of the relationship between abortion access and foster care and child welfare more broadly. Beyond deftly researching these topics, she has consistently presented clear and concise summaries, pulling relevant points out of the sea of information and succinctly summarizing key recurring narratives.

Kelsey's contributions, drawing on her considerable background in reproductive-justice work and the many connections she saw this year between that work and her work in the Family Defense Clinic, pushed the group to move the project in a new direction, from a quantitative out-of-state project to a qualitative in-state project. That the group built consensus around this idea speaks to the thoroughness of Kelsey's research, her ability to cogently present her vision for this project, and her excitement over sharing it with the group. Kelsey's curiosity and critical thinking skills were likewise on display in our individual supervision meetings, where she regularly moved beyond surface-level understanding or rote acceptance of "norms" to raise pressing questions about lawyers' roles as advocates in our legal system—and outside it.

As I hope is clear through all of this, Kelsey was a delight to supervise—or perhaps more accurately, to work alongside. She is enthusiastic, conscientious, and kind, not to mention fully dedicated to all that she takes on. Even when juggling extra responsibilities and stressors in and out of law school, Kelsey maintained a sense of perspective and balance, not to mention a quick laugh. I have no doubt that Kelsey would bring this same thoughtful, good-humored approach to her clerkship and that she would make the term a genuine pleasure.

If you have any questions or would like any additional information, I am more than happy to talk further. I can be reached on my cell phone at 530-574-6790 or, until July 1, by email at anna.arons@nyu.edu. Following that date, I will be joining the faculty at St. John's University School of Law, but I remain available to provide additional information and can be reached then at aronsa@stjohns.edu.

Sincerely,

Anna Arons

NYU | LAW

MELISSA MURRAY
Frederick I. and Grace Stokes
Professor of Law

New York University School of Law
40 Washington Square South
New York, NY 10012
P: 212 998 6440
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melissa.murray@law.nyu.edu

May 27, 2023

Dear Judge:

Kelsey Brown, a rising third-year student at NYU Law, has asked me to write a letter of recommendation in support of her application to be a clerk in your chambers. I am delighted to do so. Over the course of her time at NYU Law, I have gotten to know Kelsey well—as a member of NYU's cohort of Root-Tilden-Kern scholars, as a student in my Constitutional Law class, and as my research assistant. As a former law clerk to two federal judges (Justice Sonia Sotomayor and Judge Stefan R. Underhill), I am confident that she will be a marvelous addition to your chambers.

I first met Kelsey when she enrolled in my Spring 2022 Constitutional Law class. From the start, she distinguished herself with her careful preparation and insightful comments. I was not surprised when she wrote a very strong exam, earning an A- grade in the course. Her academic success in my class is no anomaly. As you will see from her transcripts, she graduated *magna cum laude* from Vanderbilt University with a 3.9 GPA. She has followed that undergraduate success with a very strong academic showing in her first two years at NYU Law.

Based on her strong performance in my class, I invited Kelsey to serve as one of my research assistants in her second year. In that capacity, I had the chance to observe her work habits and research and writing skills up close. Already a strong writer and a diligent student, Kelsey used the experience to further hone her research and writing skills. To be sure, her time working with me was complemented by an internship with Planned Parenthood and work as a staffer and online editor for the *NYU Law Review*. Not only did Kelsey balance these competing obligations well, she used each of these experiences to seek feedback and guidance for improving her writing skills. In just a year, she has become a more confident researcher who writes fluently and well. I was especially impressed with a research memo that she drafted, explaining the ways in which conservative interests have imbricated narratives concerning *Dred Scott*, *Lochner v. New York*, and *Roe v. Wade*. Her research has been invaluable to me as I have worked to launch a new research project on discourses of enslavement.

Kelsey's strong commitment to public service complements her academic successes. She entered NYU as the Root-Tilden Kern Jacobson Scholar for Women, Children, and Families—a tremendous honor that awarded her a full merit scholarship to NYU in recognition of her commitment to public service and her intent to dedicate her legal career to empowering marginalized families. She is already making good on these commitments. At NYU, she has been a standout student in the Family Defense Clinic, where she has represented a parent accused of neglect in family court proceedings. As a result of her clinic work, Kelsey has helped families grappling with some of the most traumatic moments in their lives, while also developing her own professional acumen in motions practice, advocacy, and family law.

Kelsey's commitment to public service runs deep and precedes her tenure at NYU Law. During her time as an undergraduate at Vanderbilt, she was deeply involved in the community surrounding the

university, tutoring refugee students in English and mentoring young Black students at a Nashville elementary school. It was during her time at Vanderbilt that Kelsey began cultivating her interests in intersectional feminism and reproductive justice. As one of the only Black interns in Vanderbilt's Margaret Cunningham Women's Center, Kelsey introduced an intersectional frame into the organization's programming efforts. She organized and led monthly "Kitchen Table Talks" in which students discussed feminism and its intersection with various social justice issues.

While an undergraduate, Kelsey also worked as an intern with the American Civil Liberties Union of Georgia in the organization's Reproductive Rights and Justice group. There, she made her mark in the period following the murder of George Floyd, creating and leading a bi-monthly community education group called "Reproductive Justice Learning Hours." She created a comprehensive syllabus that included materials related to reproductive rights and justice, and every other week, she led community members in discussion, using a reproductive justice framework to highlight how the law may serve as a tool of both reproductive oppression and liberation.

I mention these experiences because they make clear Kelsey's remarkable ability to draw connections between seemingly disparate systems and doctrines. This skill will translate well to a chambers environment in which clerks are routinely called upon to consider the broader implications of seemingly isolated issues and questions.

As with everything that she does, Kelsey has approached her clerkship search with thoughtfulness and care. Raised and educated in the South, she is eager to return to the region to clerk and work. She believes, as I do, that a district court clerkship will be a terrific foundation for her work as a public interest lawyer in the region. Put simply, Kelsey will make the most of this opportunity to serve your chambers and the broader community well.

In sum, I am delighted to recommend Kelsey to you as a judicial clerk. She is a quick learner and manages to find joy and excitement in her work, no matter the assignment. Moreover, she has a warm and lovely personality. She will fit in easily in any work environment. I hope you will give her application close consideration as you make your personnel selections. If I can be of further assistance, please feel free to contact me at melissa.murray@law.nyu.edu or via telephone at (212) 998-6440.

Sincerely Yours,

Melissa Murray
Frederick I. and Grace Stokes Professor of Law
Law clerk to the Hon. Sonia Sotomayor (2003-04)
Law clerk to the Hon. Stefan R. Underhill (2003-02)

June 05, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to enthusiastically recommend Kelsey Brown for a judicial clerkship.

Kelsey was a student in the Family Defense Clinic, which I teach at NYU. The clinic is a year-long, 14-credit course, which has both seminar and fieldwork components. Students handle all aspects of representing parents in civil child abuse and neglect proceedings. I got to know Kelsey quite well because in addition to twice weekly seminar meetings, I met with her at least once a week outside of class to supervise her work on cases.

Kelsey has all the makings of a top-notch attorney: she is smart, dedicated, and has impressive analytic and interpersonal skills. Her contributions to our seminar discussions were consistently valuable and her field work on cases was excellent. Kelsey is clearly committed to social justice, as are many of the law students I am lucky to teach. What made Kelsey stand out was her ability to transform her outrage over injustice into effective advocacy, including when she was working under pressure.

I recall in particular that Kelsey and her partner drafted a very strong set of written applications to submit to the Brooklyn Family Court following a hearing they litigated on behalf of one client, a single mother of two boys with special needs. Kelsey parsed through an extensive record to build a strong narrative that balanced tricky factual complications and made a convincing legal argument on an issue on which there was not much direct precedent. Her advocacy resulted in the Court making a finding that the foster care agency had failed to make the social service efforts it was required by law to make for our client's family—in my experience, though often merited, such judicial findings are quite rare in New York City Family Courts.

Kelsey worked with a different partner to draft a motion in another case that similarly required nuanced argument. She did a very strong job drawing on statutes and case law to convincingly argue that the Family Court had the authority to order that our client's children be moved to a new foster home and that a move would serve the children's best interests by increasing the chances of family reunification.

My aspiration is that students will do all the speaking on behalf of the clinic's clients at court appearances (with me observing rather than participating) and Kelsey rose to that challenge. She has a poise in the courtroom that serves her extremely well. She is able to modulate an impressive tenacity with realistic expectations and insight into how to effectively persuade others to her position. I recall a court appearance at which a judge unfairly scolded Kelsey for not having handled something that was actually the responsibility of one of the opposing parties. It would have been a tough moment for any attorney and Kelsey handled it with unusual composure, effectively re-directing the judge back to the issue at hand in a way that served the client.

I also saw Kelsey successfully handle tough situations outside the courtroom. She had one client whose deteriorating mental health presented particular challenges. Kelsey was patient and compassionate with the client, providing meaningful support and legal counsel even when the client was extremely tense.

In our seminar, Kelsey's comments always raised the level of the conversation. She was able to constructively push her colleagues to see controversial issues from new angles. I was particularly impressed with the ways she was able to connect the knowledge of reproductive justice issues that she brought into the course with the family regulation issues we were discussing—these are important connections that not enough advocates draw.

Additionally, Kelsey volunteered to do work beyond the requirements of the course. Toward the end of the first semester, I offered her the opportunity to take on a new case, making clear that given the timing (with exams approaching), I did not expect her to accept that offer—she nonetheless jumped right into the new assignment. Later in the year, she again went above and beyond expectations to volunteer to work on a policy project with a community-based coalition.

Throughout her time in the clinic, Kelsey demonstrated the abilities to work independently, seek supervision when appropriate, and effectively incorporate feedback.

On a more personal note, it is a delight to work with Kelsey. Having clerked myself, for the Honorable Fortunato P. Benavides, in the U.S. Court of Appeals for the Fifth Circuit, I have a sense of the importance of positive working relationships in judicial chambers. Kelsey's intelligence, active engagement, and passion for social justice were combined with an easygoing manner that made it a pleasure to work with her. I regularly saw her boost the morale of her student colleagues when they were under pressure or were grappling with the emotionally taxing aspects of our cases. And I've heard from more than one student in the class behind her that Kelsey has provided them useful advice as they make their way in the law school experience.

In short, I have no doubt that Kelsey will be a leader in whatever area of law she chooses to pursue and I am confident Kelsey would make a wonderful judicial clerk.

I would be happy to provide additional information if that would be helpful. I may be reached on my cell phone at 718-374-1364.

Christine Gottlieb - gottlieb@mercury.law.nyu.edu - 212-998-6693

Sincerely,

Christine Gottlieb

Christine Gottlieb - gottlieb@mercury.law.nyu.edu - 212-998-6693

KELSEY BROWN

kmb9591@nyu.edu
404-698-6318

WRITING SAMPLE: JUNE 2023

The attached writing sample is a memorandum I prepared in my legal writing class at New York University School of Law in the Fall of 2021. I was asked to research whether our client had a viable claim under Title VII. We were asked to look at case law in the Second Circuit. Please note that this memorandum represents my own work and received minor edits from my professor.

Cravens, Dunlop, & Vakili PLLC
Attorney Work Product
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To: Faraz Sanei
From: Kelsey Brown
Date: October 25, 2021
Re: Title VII Claim for Mrs. Anya Simo

Questions Presented:

1. What initial procedural steps does our client, Anya Simo, need to complete before filing a Title VII claim against her employer, Mr. Casey Bolder?
2. Does Mrs. Simo, a mother who was passed over for a promotion at her workplace, have a sex discrimination claim under Title VII? What is her likelihood of winning at trial?
3. What remedies might Mrs. Simo be entitled to if she wins at trial?

Short Answers:

1. **File a Job Discrimination Complaint with the EEOC.** Before Mrs. Simo can make a federal claim under Title VII, she must file a job discrimination complaint with the Equal Employment Opportunity Commission. *See Filing A Charge of Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/filing-charge-discrimination (last visited Nov. 3, 2021). Mrs. Simo's case is also covered by New York state law. As such, she has 300 days to file her complaint after initially contacting the EEOC by phone, email, or via an in-person meeting. *Id.* Mrs. Simo will need to provide detailed information of her workplace experience to the EEOC, including her employer's information and the alleged discriminatory conduct. *Id.* The EEOC will make an initial decision whether her complaint is covered by their laws. *Id.* If they determine that her complaint is covered, Mrs. Simo must complete a

questionnaire and receive counseling from the EEOC. *Id.* At this point, Mrs. Simo must decide if she wants to file a formal "Charge of Discrimination." *Id.* If she decides to move forward, the EEOC will provide a copy of the formal complaint to her workplace within 10 days. *Id.*

2. **Yes, Mrs. Simo has a Title VII claim, but her chances of winning at trial are very low.** While Mrs. Simo does have a sex discrimination claim under Title VII, she does not have a strong likelihood of winning at trial. The Second Circuit uses the *McDonnell Douglas* burden shifting framework, but the ultimate burden of proving discrimination lies with the plaintiff. Mrs. Simo has enough evidence to establish a prima facie case, but she does not have sufficient evidence to prove that her employer's nondiscriminatory reasons were pretext or sex discrimination was a motivating factor. It is likely that this case will resolve at the summary judgment stage, with the court granting summary judgment to the employer. To provide Mrs. Simo with the most advantageous result, we should explore mediation.
3. **Injunctive and Declaratory Relief.** If Mrs. Simo wins at trial under the mixed-motive theory, it is likely that she would only be entitled to injunctive and declaratory relief. Mrs. Simo's likelihood of winning at trial is very low. As such, mediation would better cater to her goals.

Introduction:

This memo proceeds in four parts. Part I provides an overview of the facts of Mrs. Simo's case, outlining the discriminatory conduct of her employer and her goals. Part II provides an overview of relevant case law addressing sex discrimination in the Second Circuit. Part III

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outlines the remedies available to Mrs. Simo based on the facts of her case, her goals, and the case law. Part IV briefly concludes.

I. Facts Summary

All of the following information is based on Mrs. Simo's intake meeting conducted on October 14, 2021, documents Mrs. Simo sent to us via email, and a statement taken from Mr. Muller, Mrs. Simo's former boss, from October 15, 2021.

Anya Simo is the mother of two children. Mrs. Simo is married but takes on the majority of the childcare responsibilities in her household. She currently works for Est1883 as an assistant super at Pine Street, an apartment complex in Brooklyn. Est1883 is a LLC based in Connecticut which is owned by Casey Bolder. They employ about 15–20 people throughout their Connecticut headquarters, their Bushwick property, and their Ozone Park property. As an assistant super, Mrs. Simo assists tenants with various maintenance issues and assists the lead super in managing the property. Mrs. Simo has worked at the Pine Street property for seven years with a continuing expectation that she would be promoted to lead super when Mr. Muller, her former boss, retired. Over that time, Mrs. Simo took on more responsibilities, built rapport with the tenants, and built relationships with local vendors.

Mrs. Simo alleges that Mr. Bolder failed to promote her to lead super because she is a mother. Around Labor Day of 2021, Mr. Bolder notified Mrs. Simo that he hired a new super from outside of the organization to replace Mr. Muller. The new super, Mr. Moreland, is also a parent. He only has custody of his children on the weekend and has fewer childcare responsibilities. He does not have prior super experience, but previously worked in construction. Mrs. Simo was not aware that Mr. Bolder was looking for applicants, nor was she given the opportunity to apply. When Mrs. Simo inquired into why Mr. Bolder did not promote her, he

mentioned issues regarding her tardiness and various Environmental Control Board (ECB) violations, including inadequate snow shoving, a blocked alley, and improper recycling.

There were a number of comments Mr. Bolder made that concerned Mrs. Simo. As Mrs. Simo and Mr. Bolder discussed the hire of Mr. Moreland, Mr. Bolder said the lead super position was a "24/7 job." He expressed concern about Mrs. Simo's ability to balance the demands of the job with parenting two children. On another occasion, Mr. Bolder was struggling to get in contact with Mrs. Simo as she was doing work in the building's basement, which has limited cell-phone reception. Once he got in contact with her, Mr. Bolder suggested that Mrs. Simo needed to work on her "work life balance." After Mrs. Simo told Mr. Bolder about her second maternity leave, Mr. Bolder said Mrs. Simo was trying to be a "super-mom" in conversation with Mr. Muller.

Mrs. Simo mentioned that the complex has a "house rules" document. This document notes she is not permitted to provide the master key to any tenants. However, on one occasion, Mrs. Simo gave the master key to a tenant who was locked out of his apartment. This tenant later misplaced the key and Mrs. Simo got the original copied. To her knowledge, Mr. Bolder is not aware of this incident.

Mrs. Simo thinks she was passed over for the promotion because she is a woman and the mother of two children. She noted that the super at the Bushwick property is a man who also has children and limited childcare responsibilities like Mr. Moreland. She does not want Mr. Moreland to lose his job at Pine Street, but she fears that his proficiency will render her assistant super position unnecessary. Ultimately, Mrs. Simo would like assurance that she can keep her job. In the alternative, she would like a super position at another Est1883 property. Out of concern for her work reputation, she does not want Mr. Bolder notified about her legal inquiry.

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Though her employer is prohibited from punishing her for filing a job discrimination complaint, her concern is warranted. *See Filing A Charge of Discrimination*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/filing-charge-discrimination (last visited Nov. 3, 2021).

II. Legal Analysis of Title VII in the Second Circuit

a. Applicability of Title VII

For Title VII to apply to Mrs. Simo's workplace, her employer must have at least 15 employees. 42 U.S.C. § 2000e-2(a). Est1883 has 15–20 employees between their New York properties and the Connecticut headquarters. Therefore, Title VII covers Mrs. Simo's claim.

b. Establishing A Prima Facie Case

The Second Circuit applies a modified version of the *McDonnell Douglas* framework where the plaintiff can opt to prove that the defendant's nondiscriminatory reason for the adverse employment action was pretext or prove that discrimination played a motivating factor in the adverse action. *See Holcomb v. Iona Coll.*, 521 F.3d 130, 138–42 (2d Cir. 2008) (describing the *McDonnell Douglas* framework). This framework uses a burden shifting approach where plaintiffs bear the initial burden of establishing a prima facie case. *See Shumway v. UPS*, 118 F.3d 60, 63 (2d Cir. 1997) ("In a Title VII case the burden is on the plaintiff to establish a prima facie case of discrimination."). At this first stage, the plaintiff only needs minimal proof of discrimination. They can rely on circumstantial evidence to satisfy this burden. *See Holcomb*, 521 F.3d at 141 ("[I]t is well settled…that employment discrimination plaintiffs are entitled to rely on circumstantial evidence.").

To establish a prima facie case, the plaintiff must satisfy four prongs. The first of which is showing that they belong to a protected class. *Shumway*, 118 F.3d at 63–4. Title VII protects

employees from sex discrimination but does not make explicit reference to parental status in the text. *See* 42 U.S.C. § 2000e-2. Case law demonstrates that "sex-plus discrimination" can be used to show membership to a protected class. *Trezza v. Hartford, Inc.,* 98 Civ. 2205 (MBM), 1998 U.S. Dist. LEXIS 20206, at *15–16 (S.D.N.Y. Dec. 28, 1998). This form of employment discrimination "occurs when a person is subjected to disparate treatment based, not solely on her sex, but on her sex considered in conjunction with a second characteristic." *Id.* In this case, Mrs. Simo is the mother of two children. As noted *supra*, the current two supers at Est1883 properties are men who have children but have limited childcare responsibilities. This suggests that Mrs. Simo's gender and motherhood in conjunction may have been a consideration in Mr. Bolder's failure to promote her. This fact alone satisfies the first prong, as there only needs to be minimal evidence of discrimination.

The second prong requires the plaintiff to demonstrate that they were qualified for the job. *Shumway*, 118 F.3d at 63–4. Evidence that the plaintiff possessed the "basic skills necessary" for the job is sufficient to satisfy this prong. *See Powell v. Syracuse Univ.*, 580 F.2d 1150, 1155 (2d Cir. 1978). For Mrs. Simo, qualification can be demonstrated by her good reputation with the tenants, her ties with local vendors, and years of assistant super experience.

The third prong requires the plaintiff to show an adverse employment action. *Shumway*, 118 F.3d at 63–4. It is "well established that a failure to promote constitutes as adverse employment action." *See Collins v. Cohen Pontani Lieberman & Pavane*, No. 04 CV 8983(KMW)(MHD), 2008 U.S. Dist. LEXIS 58047, at *47–48 (S.D.N.Y. July 30, 2008) (citing *Demoret v. Zegarelli*, 451 F.3d 140, 151 (2d. Cir. 2006); *Mauro v. S. New England Telecomms.*, Inc., 208 F.3d 384, 386 (2d Cir. 2000)). Therefore, we only need to show that Mrs. Simo was not promoted and someone else was hired for the position. The fact that Mr. Bolder did not give her

the opportunity to apply for the lead super position despite her years of experience and that he hired Mr. Moreland, who was outside of the organization and did not have previous super experience, sufficiently demonstrates this.

The final prong requires a showing of circumstances giving rise to an inference of discrimination. *Shumway*, 118 F.3d at 63–64. According to *Back v. Hastings on Hudson Union Free School District*, a plaintiff can rely on the *Price Waterhouse* "stereotyping theory" and "argue that comments made about a woman's inability to combine work and motherhood are direct evidence of such discrimination." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 (2d Cir. 2004). In *Back*, the Second Circuit held that stereotyped remarks can be evidence itself that gender played a substantial role in an adverse employment decision. *Id.* An inference of discrimination can also be "established if the plaintiff shows that the position sought went to a person outside her protected class." *Collins*, 2008 U.S. Dist. LEXIS 58047, at *48–49. Mr. Bolder's statements about Mrs. Simo's "work-life" balance and being a "super-mom" can be used as evidence of sex discrimination. The parental status of the new lead super, Mr. Moreland, and the super at the Bushwick property could also be used as comparator evidence for the discrimination that Mrs. Simo was enduring.

c. Defendant's Burden of Production

After the plaintiff has established a prima facie case, the burden shifts to the defendant employer to articulate a nondiscriminatory or legitimate reason for the adverse employment action. *See Shumway*, 118 F.3d at 63–64. This is only a burden of production. The defendant employer only needs to "*articulate* (not prove)" a nondiscriminatory reason through admissible evidence. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir. 1992) (emphasis in original). Mr. Bolder will likely argue that Mrs. Simo's tardiness and the ECB violations were

legitimate reasons for his decision to not promote her. He may also argue that Mr. Moreland is more qualified based on his construction experience and the maintenance duties of the super position.

d. Plaintiff's Burden of Proof

After the defendant employer articulates the nondiscriminatory reason, the burden of proof shifts back to the plaintiff where they ultimately have to prove discrimination. *Shumway*, 118 F.3d at 63–4. The plaintiff has two options to prove discrimination and prevail. A plaintiff can choose to rely on the pretext theory. *See Holcomb*, 521 F.3d at 141–42 (noting that "in many cases, a showing of pretext, when combined with a prima facie case of discrimination, will be enough to permit a rational finder of fact to decide that the decision was motivated by an improper motive"). Under the pretext theory, the plaintiff must show that the articulated reason was false, and that discrimination was the real reason. *Id.* This can be accomplished by "persuading the trier of fact that the employer's proffered explanation is unworthy of belief." *Tyler*, 958 F.2d at 1181. In the alternative, the plaintiff can rely on the mixed-motive theory, arguing that an "impermissible factor was a motivating factor, without proving that the employer's proffered explanation was not some part of the employer's motivation." *Holcomb*, 521 F.3d at 141–42; *see also Back*, 365 F.3d at 123–4 (noting that the plaintiff can argue that the defendant's articulated reasons were "not the only reasons and that the prohibited factor was at least one of the motivating factors"). The Second Circuit in *Back* held that the plaintiff can "rely on the same evidence that comprised her prima facie case, without more." *Id.*

The calculus of deciding between the pretext theory or the mixed-motive theory will be primarily based on the evidence available to the plaintiff. But at this final stage, the plaintiff no longer benefits from the "presumption of discrimination" that is intended to help plaintiffs

survive a 12(b)(6) motion to dismiss when establishing their prima facie case. *Holcomb*, 521 F.3d at 141 (turning to the question of whether the plaintiff raised "sufficient evidence upon which a reasonable jury could conclude by a preponderance of the evidence that the decision to fire him" was based on discrimination "without the aid of the presumption").

If Mrs. Simo wants to move forward with litigation, it will be the most strategic to utilize the mixed-motive theory. We do not have enough evidence to show that Mr. Bolder's articulated reasons were pretext as Mrs. Simo frankly admitted that she has shown up late to work and failed to address the ECB violations. Rather than trying to disprove these reasons all together, we can argue that discrimination based on her sex and parental status played a motivating factor in the failure to promote her to super along with Mr. Bolder's articulated reasons. Once again, we can rely on the comments Mr. Bolder made about Mrs. Simo's work life balance and the comments he made to Mr. Muller about Mrs. Simo being a "super mom."

III. Possible Remedies Available to Mrs. Simo

As discussed *supra*, Mrs. Simo has a claim under Title VII and can establish a prima facie case. If she were to win at trial under a pretext theory, she could possibly recover back pay, be granted injunctive relief, be awarded damages, or be granted a court ordered reinstatement. We should anticipate that a judge will likely grant summary judgment to the defendant due to weak evidence of pretext. If we decide to rely on the mixed-motive theory in Mrs. Simo's case, the defendant can take advantage of a limited affirmative defense. *Holcomb*, 521 F.3d at 142 n.4 (citing *Desert Palace Inc. v. Costa*, 538 U.S. 90, 94–95 (2003); 42 U.S.C. § 2000e-5(g)). The defendant employer has "the opportunity to demonstrate, by a preponderance of the evidence, that it would have taken the same action in the absence of the impermissible motivating factor."

Id. If Mr. Bolder meets this burden, "the court may not award damages or order reinstatement but may still order declaratory relief and some forms of injunctive relief." *Id.*

Mrs. Simo expressed that she would like to either keep her current position as an assistant super at the Pine Street location or receive a new super position at another Est1883 location. Since Mrs. Simo will likely not have enough evidence to counter this affirmative defense, mediation will be an avenue worth exploring. Negotiating a contract for Mrs. Simo's employment or guaranteeing her a super position at a different Est1883 property will best fit her situation and better serve her goals.

IV. Conclusion

According to employment discrimination case law in the Second Circuit, Mrs. Simo qualifies for a protected class status under the sex-plus discrimination theory and could bring a prima facie case. While Mr. Bolder's statements about her ability to do the super job because of her motherhood duties could be used as evidence of a discriminatory motive, Mrs. Simo does not have enough evidence to prevail at trial. Mr. Bolder has credible evidence of nondiscriminatory reasons for not promoting Mrs. Simo to super which we would be unable to strongly rebut. Even if Mrs. Simo was able to prevail under the mixed-motive theory, Mr. Bolder would likely be able to take advantage of the affirmative defense, limiting Mrs. Simo's relief to declaratory or injunctive relief, neither of which would result in job assurance for Mrs. Simo. In this case, mediation is a better route than litigation and caters to Mrs. Simo's goals.

Applicant Details

First Name	**Rachel**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
Email Address	**rachelbrown812@gmail.com**
Address	**Address** Street **9900 Georgia Ave, Apt 308** City **Silver Spring** State/Territory **Maryland** Zip **20902** Country **United States**
Contact Phone Number	**3012470235**

Applicant Education

BA/BS From	**Mercyhurst College**
Date of BA/BS	**June 2012**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 9, 2021**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Edward W. Hinton Moot Court**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Conyers, Herschella
hconyers@uchicago.edu
(773) 576-5076
Hemel, Daniel
daniel.hemel@nyu.edu
212.998.6354

This applicant has certified that all data entered in this profile and any application documents are true and correct.

9900 Georgia Ave.
Apt. 308
Silver Spring, MD 20902
301-247-0235
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June 12, 2023

The Honorable Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a second year associate in the Washington, D.C. office of King & Spalding, and I am applying for a clerkship in your chambers for the 2024-2025 term.

Enclosed are a resume, transcript, and writing sample. Letters of recommendation from Professors Conyers and Hemel will arrive under separate cover. Should you require additional information, please do not hesitate to let me know. Thank you for considering my application.

Sincerely,

/s/ Rachel Brown

Rachel Brown

9900 Georgia Ave., Apt. 308, Silver Spring, MD 20902 ● 301-247-0235 ● rachelbrown812@gmail.com

Education

The University of Chicago Law School, Chicago, IL
Juris Doctor, *with honors*, June 2021
- Hinton Moot Court Semi-finalist; Criminal and Juvenile Justice Project Clinic; OutLaw, 2L Representative

Mercyhurst University, Erie, PA
Bachelor of Arts in Political Science, concentration in International Relations, *summa cum laude*, May 2012
Minor in Social Welfare

Experience

King & Spalding, Washington, D.C.
Associate, October 2021 to Present
- Conduct legal research and draft motions and legal memoranda

Summer Associate, July 2020

The University of Chicago, Chicago, IL
Resident Head, August 2020 to June 2021
- Established and maintained positive relationships and a safe and inclusive environment for residents
- Supervised Resident Assistants and supported Resident Assistants in developing leadership skills

Professor Emily Buss, The University of Chicago Law School, Chicago, IL
Research Assistant, August to December 2019
- Conducted legal research on the First Amendment free speech rights of public school students, on the Establishment Clause in public schools, and on matters related to state juvenile justice proceedings

Criminal and Juvenile Justice Project, The Edwin F. Mandel Legal Aid Clinic, Chicago, IL
Legal Intern, June to August 2019
- Conducted legal research, including research on statutory, evidentiary, and constitutional issues
- Drafted motion in limine and motion to release; edited motion to suppress
- Reviewed discovery, including 911 calls, bodycam footage, police reports, and medical records

Manno for Congress, Gaithersburg, MD
Campaign Coordinator, November 2017 to June 2018
- Collaborated with candidate and team to develop and implement campaign strategy
- Scheduled, planned, and staffed campaign events; recruited and managed campaign staff and interns
- Communicated with progressive organizations and unions to request endorsements

Macon Bistro and Larder, Washington, DC
Hostess and Server, June to November 2017

AmeriHealth Caritas, Erie, PA
Community Health Navigator, March 2015 to June 2017
- Provided preventative health education workshops at non-profits and community centers
- Engaged hard-to-reach Medicaid plan members through home visits and provided appropriate referrals

SafeNet Domestic Violence Safety Network, Erie, PA
Intern, March to June 2012; Outreach Advocate, June 2012 to March 2015
- Provided crisis and ongoing counseling services and safety planning to survivors of domestic violence
- Conducted community outreach and education at colleges and universities, wellness fairs, and hospitals

Crisis Residential Unit, Safe Harbor Behavioral Health, Erie, PA
Mental Health Aide in the Crisis Residential Unit, November 2011 to April 2013
- Led informative and supportive group sessions

Interests

- Exploring new outdoor spaces through hiking and camping, poetry, ballet and modern dance

THE UNIVERSITY OF CHICAGO

Name: Rachel Amie-Elysia Brown
Student ID: 12178397

University of Chicago Law School

Degrees Awarded

Degree: Doctor of Law
Confer Date: 06/09/2021
Degree GPA: 180.187
Degree Honors: With Honors
J.D. in Law

Academic Program History

Program: Law School
Start Quarter: Autumn 2018
Current Status: Completed Program
J.D. in Law

External Education

Mercyhurst College
Erie, Pennsylvania
BA 2012

EP or EF (Emergency Pass/Emergency Fail) grades are awarded in response to a global health emergency beginning in March of 2020 that resulted in school-wide changes to instruction and/or academic policies.

Beginning of Law School Record

Autumn 2018

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law David A Strauss	3	3	182
LAWS	30211	Civil Procedure I Emily Buss	3	3	181
LAWS	30311	Criminal Law Jonathan Masur	3	3	179
LAWS	30611	Torts Daniel Hemel	3	3	184
LAWS	30711	Legal Research and Writing Emma Kaufman	1	1	178

Winter 2019

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Genevieve Lakier	3	3	179
LAWS	30411	Property Lior Strahilevitz	3	3	181
LAWS	30511	Contracts Douglas Baird	3	3	179
LAWS	30611	Torts Saul Levmore	3	3	184
LAWS	30711	Legal Research and Writing Emma Kaufman	1	1	178

Spring 2019

Course		Description	Attempted	Earned	Grade
LAWS	30221	Civil Procedure II Alison LaCroix	3	3	179
LAWS	30411	Property Lior Strahilevitz	3	3	181
LAWS	30511	Contracts Douglas Baird	3	3	179
LAWS	30712	Lawyering: Brief Writing, Oral Advocacy and Transactional Skills Emma Kaufman	2	2	182
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	176

Autumn 2019

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure Ernest Young	3	3	180
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	183
LAWS Req Designation:	53380	Women's Human Rights in the World Meets Writing Project Requirement Claudia Flores	3	3	EP
LAWS	53397	Divorce Practice and Procedure Erika Walsh Donald Schiller	3	3	179
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	180

Honors/Awards
The Thomas R. Mulroy Prize, for excellence in appellate advocacy and oral argument in the Hinton Moot Court Competition

Date Issued: 08/21/2022

THE UNIVERSITY OF CHICAGO

Name: Rachel Amie-Elysia Brown
Student ID: 12178397

University of Chicago Law School

Winter 2020

Course		Description	Attempted	Earned	Grade
LAWS	47201	Criminal Procedure I: The Investigative Process Sharon Fairley	3	3	180
LAWS	53365	LGBT Law Camilla Taylor	3	3	180
LAWS	53451	Civil Rights Litigation in the Child Welfare Context Diane L Redleaf	2	2	180
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	180
LAWS	95020	Hinton Moot Court Competition	3	3	P
Req Designation:		Meets Writing Project Requirement M. Todd Henderson Douglas Baird Elizabeth Kregor			

Spring 2020

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Emily Buss	3	3	EP
LAWS	43200	Immigration Law Adam Chilton	3	3	EP
LAWS	43273	Emotion, Reason, and Law Martha C Nussbaum	3	3	EP
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	EP

Autumn 2020

Course		Description	Attempted	Earned	Grade
CRWR	30306	Beginning Poetry Workshop Peter O'Leary	3	3	A-
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	179
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	180
LAWS	93499	Independent Research: Mental Health and the Rights of Children in the Juvenile Justice System	3	3	180
Req Designation:		Meets Substantial Research Paper Requirement Herschella Conyers			

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process David A Strauss	3	3	180
LAWS	42801	Antitrust Law Eric Posner	3	3	179
LAWS	43218	Public Choice Saul Levmore	3	3	181
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	180

Spring 2021

Course		Description	Attempted	Earned	Grade
HIJD	38880	Modern Jewish Religious Thought: An Introductory Survey Paul Mendes-Flohr Joel Swanson	3	3	P
LAWS	81010	Trial Advocacy Herschella Conyers Erica Zunkel Judith Miller Craig Futterman Jorge Alonso	3	3	180
LAWS	90217	Criminal and Juvenile Justice Project Clinic Herschella Conyers	1	1	180
SSAD	40532	Motivational Interviewing Christopher Link	3	3	P

Honors/Awards
Completed Pro Bono Service Initiative

End of University of Chicago Law School


THE UNIVERSITY OF
CHICAGO

June 08, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Clerkship Recommendation for Rachel Brown

Dear Judge Sanchez:

I unqualifiedly recommend Rachel Brown as a judicial clerk candidate. Rachel was one of the best students with whom I have worked in my over twenty-five years of teaching at the University of Chicago. I would rank her in the top 5% of students to date. Rachel's deeply probing intelligence, tireless work ethic and commitment to public service distinguish her from an extraordinary student body.

I have had numerous opportunities to observe Rachel and evaluate her work. I hired Rachel as one of two summer interns at the end of her first year of law school. Rachel then spent two years with me as a student in the Criminal/Juvenile Justice Clinic at the University of Chicago Law School. Rachel spent hours above the minimum requirement of 4 hours per week under my direct supervision. Her capacity for hard work made supervising her a genuine treat. She completed assignments promptly and often ahead of due dates. More importantly, the assignments were completed thoughtfully and thoroughly. No matter how new the task or difficult the assignment, Rachel's work was consistently excellent. Rachel also completed the 2021 Intensive Trial Practice Workshop which I administered and co-taught. She earned one of the highest grades.

A recommendation letter does not allow me to fully detail the superior quality and range of Rachel's work. During her time at the clinic, Rachel worked tirelessly on several cases both in state criminal and juvenile courts. She researched and drafted both internal memos and court motions; led team meetings; routinely visited detained clients and prepared witness examinations for hearings and trial.

One brief example of Rachel's work in the Clinic should suffice. Rachel was a team leader in an attempt first-degree murder case. The shooting was captured on video. Rachel helped draft a successful motion to reduce bond which allowed our client to be released from custody. She also drafted pre-trial motions in limine and prepared witness cross-examinations. Rachel's two years of work on this case was an integral part of our client's acquittal on all counts.

Throughout her time in the clinic Rachel regularly visited clients in the detention center and the jail: both casual visits and more formal pre-trial interviews (via zoom). Rachel worked closely with the social work students assigned to the cases, often discussing educational, mental health, and re-entry issues that impacted the clients. Her appreciation of the value of interdisciplinary collaboration was evident and genuine. Rachel's work on her other cases and projects was equally exceptional.

Rachel is well-suited for a clerkship. She knew how to spot issues, research the law, and prepare succinct and cogent arguments.

Rachel also established herself as a student leader in the clinic. She took responsibility for coordinating the schedules and assignments of the case team members to ensure a consistent flow of information and collaboration. She initiated strategy and planning discussions and routinely contributed creative suggestions. Her attention to detail never stifled her ability to keep sight of the ultimate goal. She was patient, attentive and able to communicate without judgment.

Rachel's commitment to public service is obvious and proven. She has taken opportunities to provide service and advocacy in any number of arenas. Historically, her extracurricular experiences demonstrate career and social choices aimed at enriching society. Her volunteer activities in law school continued to reflect such goals.

In addition to Rachel's extraordinary talent and work ethic, she was a personal delight. Her integrity was unquestioned. I never knew her to be narrow-minded, biased, or unkind. She exudes a commitment to excellence, which inspires others, including myself, to give their absolute best.

In summary, Rachel Brown is an extraordinarily smart, talented, and hard-working young woman. She is already an outstanding person, and I am certain she is now an extraordinary lawyer. Rachel was an exceptional student; I'm certain she would be an exceptional clerk. If I can provide any further information which would assist you, please do not hesitate to contact me at (773) 702-9611.

Sincerely,

/s/ Herschella G. Conyers

Herschella G. Conyers
Lillian E. Kramer Clinical Professor of Law
Director: Criminal & Juvenile Justice Clinic

Herschella Conyers - hconyers@uchicago.edu - (773) 576-5076

June 07, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Rachel Brown, a Class of 2021 graduate of the University of Chicago Law School, for a clerkship in your chambers. Rachel is a rigorous thinker, a clear writer, a hard worker, and a genuinely caring person. If one were to plot a graph with IQ on the y-axis and emotional quotient (EQ) on the x-axis, Rachel would be way off in the upper right quadrant (i.e., one of the few people who performs spectacularly on both dimensions). I endorse her application with enthusiasm.

Some students were destined from early on in life to go to law school and excel there. Rachel was not one of those students. Her path to the law was roundabout, and the experiences she amassed along the way will prove invaluable throughout her legal career. Rachel's goal from a young age was to become a professional dancer, and her dogged pursuit of that objective may be the source of her tremendous discipline. She chose to attend college at Mercyhurst University, a Catholic liberal arts college in Erie, Pennsylvania, because of its strong performing arts program. Shortly before arriving at Mercyhurst, though, she suffered a career-ending injury. She suddenly found herself without a clear life course.

Rachel now describes her injury as a blessing in disguise. She threw herself into academics and graduated summa cum laude. She devoted her extra time to community service at a nonprofit organization providing mental health counseling to domestic violence survivors. Her involvement with that organization, SafeNet Domestic Violence Safety Network, continued after college. She spent the next three years at SafeNet doing difficult outreach and emergency medical response work with individuals emerging from violent settings, followed by two more years as a community health navigator helping to enroll eligible individuals and families in Medicaid.

It was around then that Rachel decided that she could maximize her positive impact on mental health and child welfare if she had a law degree. Her parents—who had moved around the country when Rachel was growing up on account of her father's Army service—were living in Maryland at the time, and she returned home to study for the LSAT and prepare her applications. With some extra time on her hands, she took what she expected would be a low-level job working on a state senator's long-shot campaign for an open congressional seat.

Pretty soon, Rachel had become the equivalent of the state senator's campaign manager. (The state senator never hired a campaign manager—Rachel's title was "campaign coordinator," but she effectively ran the operation.) Once you meet Rachel, you'll see why the state senator wanted her in charge. And if you glance at a map of Maryland's 6th Congressional District, you'll see what made the job such a challenge. The district is one of the country's most gerrymandered, stretching from the state's northwest corner all the way to the Washington suburbs. Rachel planned candidate events across the vast district, cobbled together a campaign staff, and worked closely with the candidate on all aspects of strategy and messaging. The state senator's bid was ultimately unsuccessful, but along the way, Rachel amassed a wealth of management experience and a deeper understanding of a range of legal and policy issues.

By the time that Rachel arrived at Chicago, she had been out of school for six years. It often takes students in Rachel's position a couple of quarters to get back into the academic swing, but not her. Chicago's 186-point grading scale is difficult for outsiders to decipher, but a rough translation is that anything 179 or above would be the equivalent of an "H" at Harvard, Yale, or Stanford. (Having attended Yale and taught at Harvard and Stanford, I can attest that this rough translation is in fact quite accurate.) Rachel received a 179 or better in all of her required blackletter courses 1L year (with marks slightly below that in the first two quarters of a legal writing sequence and an elective).

I had the pleasure of teaching Rachel in Torts her 1L year. She was thoroughly prepared for every cold call, and her answers were often creative and always insightful. I would describe her as one of the quieter students in the course, but it was impossible not to notice her intelligence. And her final exam was truly marvelous. What impressed me the most was the practicality of her answers—when a question asked her to write a memo to a hypothetical client, she gave advice that was not only doctrinally astute, but also world-wise. She ended up with the second-highest grade in a class of 95. When I taught the course the next year, I distributed Rachel's outline to all of the students because it was so much better than any of the study materials they could purchase.

Rachel continued to excel in law school after her 1L year. She was a Moot Court semifinalist and an officer of OutLaw, the school's LGBTQ student organization. She also was an active member of the Criminal and Juvenile Justice Project Clinic, and she played a key role on a team that secured an acquittal after a bench trial for a defendant in an attempted murder case. She did this all while serving as a resident head in "the College" (i.e., the undergraduate side of the University of Chicago), which meant that she was—in effect—on call 24 hours a day for students in the dormitories.

I didn't have another opportunity to teach Rachel in law school, but we've kept in touch as she has launched her legal career. She is now a litigation associate at King & Spaulding in Washington, D.C.—enjoying the experience but ready for a new endeavor. I am confident that, whatever path she chooses, she will have a positive and meaningful impact on the lives of many people. She is particularly interested in mental health and child advocacy, and I expect that her career will involve long stretches in the

Daniel Hemel - daniel.hemel@nyu.edu - 212.998.6354

government and/or nonprofit sectors. She will make her professors proud to have taught her, and you will be proud to count her as one of your former clerks.

Since teaching Rachel, I have joined the faculty of New York University School of Law; my new email address is daniel.hemel@nyu.edu, and my cell phone number is 914-629-7352. Please do not hesitate to contact me with any additional questions about Rachel's application.

Sincerely,

Daniel J. Hemel

Rachel Brown Writing Sample

9900 Georgia Ave., Apt. 308, Silver Spring, MD 20902 ● 301-247-0235 ● rachelbrown812@gmail.com

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This writing sample is an excerpt from the Respondent's Brief on writ of certiorari to the United States Court of Appeals for the Fourth Circuit. I drafted this brief for the Hinton Moot Court Semifinals in Winter 2020. The competition was based upon *United States Patent and Trademark Office v. Booking.com B.V.*, which was pending before the United States Supreme Court at the time. The Court has since issued its opinion. The entire brief is available upon request.

QUESTION PRESENTED

The Lanham Act, 15 U.S.C. 1051 *et seq.*, prohibits registration of generic terms as trademarks. Where an online business adds a top-level domain (".com") to an otherwise generic term, is the resulting composite mark per se generic?

STATEMENT OF THE CASE

Respondent Booking.com, B.V. ("Booking.com") [1] operates a website that allows customers to search, read reviews, and reserve travel and hotel accommodations online. In 2011 and 2012, Booking.com sought protection for its brand by filing four trademark applications with the United States Patent and Trademark Office (the "USPTO") requesting registration of the term BOOKING.COM and stylized versions of the same.[2] Booking.com sought registration for Class 39 (travel agency services) and Class 43 (hotel reservation services).[3]

The USPTO examiner denied Booking.com's applications on the grounds that BOOKING.COM was generic as to the relevant services and, in the alternative, that the term was "merely descriptive and that Booking.com had failed to establish that they had acquired secondary meaning as required for trademark protection."[4] On appeal to the Trademark Trial and Appeal Board (the "TTAB"), the TTAB found that "booking" refers to reservations for a travel ticket or hotel room or the act of making such a reservation, that ".com," which "indicates a commercial website," does not "negate the generic character of the term 'booking,' and that the combined term BOOKING.COM would be understood by consumers primarily to refer to an online reservation service for travel, tours, and lodging, which is consistent with the services

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[1] Throughout this brief, "Booking.com" refers to Respondents and "BOOKING.COM" refers to the proposed trademark.
[2] *Booking.com B.V. v. Matal*, 915 F.3d 171, 177 (4th Cir. 2019).
[3] *Booking.com B.V. v. Matal*, 278 F.Supp.3d, 891, 922 (E.D. VA 2017).
[4] *Booking.com*, 915 F.3d at 177.

proposed in the applications."[5] Based upon these findings, the TTAB affirmed the refusal of all four applications.[6]

In April 2016, Booking.com filed this civil action in the Eastern District of Virginia against the USPTO and its Director, challenging the USPTO's denial of its trademark applications under 15 U.S.C. § 1071(b).[7] Before the district court, the parties filed the administrative record from the USPTO proceedings:

> The evidence . . . included dictionary definitions of the words "booking" and ".com;" print-outs of plaintiff's webpages; examples from news articles and travel websites of terms such as "online booking services" and "booking sites," used to refer to hotel reservation and travel agency services; examples of eight third-party domain names that include "booking.com;" a 2012 JD Power & Associates press release and survey results, indicating that Booking.com ranked highest in overall customer satisfaction; and a declaration from plaintiff's director listing awards won by plaintiff and figures regarding plaintiff's sales success, advertising campaigns, followers on social media, and unsolicited news articles.[8]

The parties also produced new evidence relevant to the question of genericness.[9] Namely, Booking.com submitted results from a Teflon survey conducted in 2016 "indicat[ing] that 74.8 percent of consumers of online travel services recognize BOOKING.COM as a brand," rather than a common or generic name.[10] Teflon surveys are the "most judicially accepted format for testing for genericness."[11] These surveys evaluate how the consuming public understands a proposed mark by "provid[ing] survey respondents with a primer on the distinction between [ ] generic or common names and trademark or brand names, and then present[ing] respondents

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[5] *Booking.com*, 278 F.Supp.3d at 898 (internal quotations omitted) (summarizing TTAB findings).
[6] *Id*.
[7] *Id*.
[8] *Id*. at 897–98.
[9] *Id*.
[10] *Id*. at 920.
[11] 2 McCarthy on Trademarks and Unfair Competition § 12:16 (5th ed.).

with a series of names, which they are asked to identify as common or brand names."[12] The USPTO submitted a report authored by a rebuttal expert.[13]

Reviewing the record de novo and acting as finder of fact as required by 15 U.S.C. § 1071(b),[14] the district court found "that the relevant consuming public primarily understands that BOOKING.COM does not refer to a genus, rather it is descriptive of services involving 'booking' available at that domain name."[15] On this finding, the district court concluded that "although 'booking' was a generic term for the services identified, BOOKING.COM *as a whole* was nevertheless a descriptive mark."[16] Further finding that Booking.com had "carried its burden of demonstrating the mark's secondary meaning as to the hotel reservation services described in Class 43 but not as to the travel agency services recited in Class 39," the district court partially granted Booking.com's Motion for Summary Judgment and ordered the USPTO to register BOOKING.COM as to Class 43 services.[17]

The USPTO appealed to the United States Court of Appeals for the Fourth Circuit on the ground that BOOKING.com is a generic term that can never receive trademark protection.[18] The USPTO conceded on appeal that, if the mark "may properly be deemed descriptive, the district court's finding that it has acquired secondary meaning was warranted," leaving only the question of genericness before the court.[19]

The Fourth Circuit affirmed. Emphasizing that "[g]enericness is a question of fact to which the district court, as the trier of fact, is accorded great deference," the court held that "in

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[12] *Booking.com*, 278 F. Supp.3d at 915.
[13] *Id*. at 898.
[14] *See Id*. at 899.
[15] *Id*. at 918.
[16] *Booking.com*, 915 F.3d at 178 (emphasis in original).
[17] *Booking.com*, 278 F.Supp.3d at 923–24.
[18] *Booking.com*, 915 F.3d at 179.
[19] *Id*.

weighing the evidence before it, [the district court] did not err in finding that the USPTO failed to satisfy its burden of proving that the relevant public understood BOOKING.COM, taken *as a whole*, to refer to general online hotel services rather than Booking.com the company."[20] The court explained that it was not error for the district court to find that the evidence weighed against genericness, based primarily on the USPTO's failure to demonstrate that the public uses the proposed mark, as a whole, generically and on Booking.com's Teflon survey.[21]

The court emphasized that, in evaluating genericness, the proper inquiry is "whether the public primarily understands the term *as a whole* to refer to the source or the proffered service."[22] The Fourth Circuit rejected the USPTO's proposed bright line rule that "adding the top-level domain [ ] .com to a generic second-level domain [ ] like booking can never yield a non-generic mark."[23] A domain name is comprised of a Top Level Domain (a "TLD") and a Second Level Domain (an "SLD"):

> The Top Level Domain is the final portion of the web address—such as ".com," ".gov," or ".edu"—that signifies the category of website: i.e. commercial, government, or educational. The Secondary Level Domain is the preceding part of the web address.[24]

Thus, in the domain name "booking.com," the TLD is ".com" and the SLD is "booking." The Fourth Circuit emphasized that "when '.com' is combined with an SLD, even a generic SLD, the resulting composite may be non-generic where evidence demonstrates that the mark's primary significance to the public as a whole is the source, not the product."[25]

Judge Wynn, concurring in part, disagreed with the level of deference the majority accorded the district court's factual findings, believing that those findings were tainted by the

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[20] *Id*. at 181 (emphasis in original).
[21] *Id*. at 181–82.
[22] *Id*. at 185 (emphasis in original).
[23] *Id*. at 181.
[24] *Id*. at 188 n.1 (Wynn, J., concurring in part).
[25] *Id*. at 186.

district court's erroneous view that a domain name is necessarily descriptive.[26] The majority, however, recognized that the district court's factual conclusions on primary significance were based upon its evaluation of the record evidence and not a simple application of a per se rule. Because the majority based its genericness conclusions upon those valid factual findings, the Fourth Circuit could affirm despite the district court's legal error.[27]

SUMMARY OF THE ARGUMENT

Booking.com operates a website that allows customers to search, read reviews, and reserve travel and hotel accommodations online. Each year, customers in the United States "conduct billions of dollars' worth of transactions" using Booking.com's online services. Booking.com has provided these services to its customers under the proposed trademark BOOKING.COM on a continuous and uninterrupted basis for nearly fourteen years.[28] On social media the mark BOOKING.COM is widely recognized, with over 5 million "likes" on Facebook and over 100,000 "follows" on Twitter as of 2016.[29] Results from a Teflon survey—"the most judicially accepted format for testing for genericness"[30]—conducted in 2016 "indicated that 74.8 percent of consumers of online travel services recognize BOOKING.COM as a brand," rather than a common or generic name.[31]

Booking.com seeks trademark protection of the term BOOKING.COM to protect the consumer goodwill associated with its brand. The law of trademarks "intends to protect the goodwill represented by marks and the valid property interests of entrepreneurs in that goodwill

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[26] *Booking.com*, 915 F.3d at 189–190 (Wynn, J., concurring in part).
[27] *Id.* at 185 n.9.
[28] *Booking.com*, 278 F.Supp.3d at 921.
[29] *Id*.
[30] McCarthy on Trademarks § 12:16.
[31] *Booking.com*, 278 F.Supp.3d at 920.

against those who would appropriate it for their own use."[32] Trademark law is also concerned with "protect[ing] for public use those commonly used words and phrases that the public has adopted," reserving such generic words for the "linguistic commons."[33] While the balance between "the right to protect and the right to use"[34] is delicate, Congress, in passing the Lanham Act, chose to strike that balance by affording protection to descriptive terms upon a showing that the term has acquired secondary meaning and barring registration for any term deemed generic.[35] Congress also mandated that genericness be "determined by the primary significance of the term to the purchasing public . . . ."[36]

The legal standards for determining whether a mark is generic are clear and well-established. The USPTO "always bears the burden of proving genericness by clear and convincing evidence" in registration proceedings.[37] Whether a mark is generic is a question of fact.[38] The essential question that must be answered in determining whether a mark is generic is whether "the primary significance of the term in the minds of the consuming public is not the product but the producer."[39] Determining primary public understanding "requires consideration of the mark as a whole."[40]

The district court determined, weighing all the record evidence in its role as finder of fact, that the primary public understanding of BOOKING.COM referred to the brand Booking.com and not the genus of online hotel reservation services. "It is axiomatic that

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[32] *Am. Online, Inc. v. AT&T Corp.*, 243 F.3d 812, 821 (4th Cir. 2001).
[33] *Id.*
[34] *Id.*
[35] *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10 (2d Cir. 1976).
[36] S.Rep. No. 515, 100th Cong., 2d Sess., 2 (1988).
[37] *In re Cordua Restaurants, Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016).
[38] *See Advertise.com, Inc. v. AOL Advert., Inc.*, 616 F.3d 974, 977 (9th Cir. 2010).
[39] *Kellogg Co. v. Nat'l Biscuit Co.*, 305 U.S. 111, 118 (1938).
[40] *In re 1800Mattress.com IP, LLC*, 586 F.3d 1359, 1363 (Fed. Cir. 2009) (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 1297 (Fed. Cir. 2005)).

determinations regarding the relative weight of evidence are left for the trier of fact."[41] Considering the strength of the Teflon survey evidence, which indicated that 74.8 percent of consumers understand the mark as a brand, juxtaposed with the relative weakness of the USPTO's counter-evidence, the district court was not clearly erroneous in weighing the evidence as it did. Thus, under the prevailing legal standards, BOOKING.COM was properly deemed non-generic by the lower courts.

Petitioner claims that affirming the lower courts would "harm the public through promoting monopolistic competition" and would "allow [Booking.com] to bar competitors from using their own names."[42] Yet there is no reason to believe that the existing legal framework would be insufficient to protect against the consequences the USPTO fears. Affirming the lower courts would not entitle every domain name to trademark protection—even where a mark is deemed descriptive, it still must demonstrate acquired secondary meaning to be eligible for registration.[43] If secondary meaning is proven and the mark is registered, the doctrine of fair use and the likelihood of confusion standard provide further protection of competition.

As this Court explained in *Qualitex v. Jacobson Products*, it is the ability of a mark to identify the source of a product, not the mark's "ontological status as color, shape, fragrance, word, or sign—that permits it to serve the[ ] basic purposes" of a trademark.[44] The same is true of domain names. Sometimes, as with BOOKING.COM, a domain name consisting of an otherwise unregistrable second-level domain combined with a generic top-level domain "will

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[41] *Booking.com*, 915 F.3d at 183.
[42] *See* Brief for Petitioner 100-2 at 12–13.
[43] *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992).
[44] *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 164 (1995).

meet ordinary legal trademark requirements. And, when it does so, no special legal rule prevents [it] from serving as a trademark."[45]

A decision affirming the Fourth Circuit requires no novel approach. As explained earlier, the decision below is firmly grounded in the prevailing legal standards of genericness. Booking.com merely asks this Court to decline to create a carve-out within trademark law that would apply a special bright-line, per se rule for an entire subset of domain names. In doing so, we ask this Court to follow the approach taken by every other circuit court of appeals to have addressed this issue and to hold that where a domain name is created by adding a TLD to an otherwise generic SLD, the resulting composite mark may be protectable if it satisfies the legal standards that apply in every other trademark case. Under the prevailing legal standard, the evidentiary record demonstrates that the USPTO failed to satisfy its burden of proving by clear and convincing evidence that BOOKING.COM is generic. As such, the judgment that the mark BOOKING.COM is non-generic and eligible for trademark protection should be affirmed.

ARGUMENT

This Court should affirm the judgment of the Fourth Circuit because (1) the USPTO failed to satisfy its burden of proving by clear evidence that the proposed mark BOOKING.COM, taken as a whole, is generic, and (2) the USPTO's proposed bright line rule, which would operate as a total bar on registration of proposed marks that combine an otherwise unregistrable SLD with a TLD, should be rejected.

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[45] *Id*. at 161 (concluding that, where a color, standing alone, "meet[s] ordinary legal trademark requirements," it is eligible for trademark protection).

I. OMITTED

II. The USPTO's proposed per se rule is inconsistent with settled law and against the purposes of the Lanham Act.

The USPTO argues that affirming the Fourth Circuit would not only require overturning "landmark" precedent,[46] but would harm consumers by giving Booking.com "monopolistic advantage"[47] and granting "online generic entities . . . control[ ] [over] the use of generic terms[.]"[48] As explained in detail below, these concerns are an inaccurate representation of the choice facing this Court.

A. The USPTO's per se rule is inconsistent with settled law.

A genericness finding sounds a trademark's death knell. Because such a finding "is a fateful step," pitching the mark into the public domain forever,[49] modern trademark law has developed strong evidentiary standards to ensure that only those marks that are actually generic are denied protection.

1. The proposed per se rule is inconsistent with modern genericness law.

Once a mark is found to be generic it can never be protected as a trademark under the Lanham Act.[50] In light of the serious loss of valuable property rights that can attend a genericness finding, "[w]hen one applies to the [USPTO] for registration of a term as a trademark, the burden of showing that the term is unregistrable as a generic term is with the

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[46] *See* Brief for Petitioner 100-2 at 11.
[47] *See Id*. at 12–13.
[48] *See Id*. at 17–28.
[49] *Ty Inc. v. Softbelly's Inc.*, 353 F.3d 528, 531 (7th Cir. 2003).
[50] *See Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) (citing 15 U.S.C. §§ 1052, 1064(3)) ("Generic terms are not registrable, and a registered mark may be canceled at any time on the grounds that it has become generic.")

[US]PTO."[51] To satisfy its burden, the USPTO must prove genericness by "clear and convincing evidence."[52]

The USPTO's per se rule would provide it with a short-cut around these well-established evidentiary standards for a potentially significant number of trademarks operating online. Lowering the evidentiary standard in this way is not only inadvisable, but also unnecessary. There is no reason to believe that existing trademark law cannot operate effectively online.

2. The USPTO's reliance on *Goodyear's* is misguided.

The USPTO claims that *Goodyear's* mandates reversal. In *Goodyear's Rubber Manufacturing Company v. Goodyear Rubber Company*, this Court held that the name "Goodyear Rubber Company" was not eligible for trademark protection because the term "Goodyear Rubber" was "descriptive of well-known classes of goods produced by the process known as 'Goodyear's Invention' . . . [and] the word 'Company' only indicates that parties have formed an association or partnership to deal in such goods."[53] *Goodyear's* is not controlling in this case because (1) *Goodyear's* is a pre-Lanham Act case and the legal standards for generic and descriptive marks have changed substantially in the decades since it was decided, and (2) a TLD is not sufficiently similar to an entity designation to support extending *Goodyear's* per se rule to domain names.

This Court decided *Goodyear's* "almost sixty years before the Lanham Act and, crucially, did not apply the primary significance test."[54] This Court has previously acknowledged the reduced precedential force of case law that, like *Goodyear's*, "interpret[s] trademark law as it

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[51] McCarthy on Trademarks § 12:12.
[52] *In re Cordua Restaurants*, 823 F.3d at 600. *See also* McCarthy on Trademarks § 12:12 n.14 (collecting cases); *Trademark Manual of Examining Procedure* 1209.01(c)(i)(2018 ed.) ("The examining attorney has the burden of proving that a term is generic by clear evidence.").
[53] *Goodyear's Rubber Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 602–03 (1888).
[54] *Booking.com*, 915 F.3d at 184.

existed before 1946, when Congress enacted the Lanham Act." This is because "[t]he Lanham Act significantly changed and liberalized" trademark law.[55] Prior to the Lanham Act, "neither those terms which were generic nor those which were merely descriptive could become valid trademarks,"[56] meaning that in *Goodyear's* the proposed mark was rejected as descriptive with no analysis of where "the term [sat] at the fuzzy boundary between [the generic and merely descriptive] classifications."[57] Most importantly, the court did not apply the modern test for genericness: whether "the primary significance of the term in the minds of the consuming public is not the product but the producer."[58]

Even where courts have considered that, despite changes in the law, the USPTO's analogy between *Goodyear's* and a TLD may have merit, they have nonetheless noted that the analogy is "not a perfect" one because TLDs "can convey more than simply the organizational structure of an entity that uses the mark."[59] Because an entity designation and a TLD are distinguishable, "the per se rule in *Goodyear's* that 'Corp.', etc. never possess source-indicating significance does not operate as a per se rule . . . with respect to TLDs."[60] The Federal Circuit has stated that "*Goodyear*'s did not create a per se rule for TLD indicators. In fact, in rare

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[55] *Qualitex*, 514 U.S. at 171.
[56] *Abercrombie & Fitch*, 537 F.2d at 9.
[57] *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1569 (Fed. Cir. 1987).
[58] *Kellogg*, 305 U.S. at 118.
[59] *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1175 (Fed. Cir. 2004).
[60] *Id.* ("Such a [bright-line] rule would be a legal error."). *See also In re Steelbuilding.com*, 415 F.3d at 1299 (rejecting a per se rule and holding that "steelbuilding.com" is a protectable trademark); *Advertise.com*, 616 F.3d at 982 ("We have already stated that we create no per se rule against the use of domain names, even ones formed by combining generic terms with TLDs, as trademarks."); *Booking.com*, 915 F.3d at 186 ("We therefore decline to adopt a per se rule and conclude that when '.com' is combined with an SLD, even a generic SLD, the resulting composite may be non-generic where evidence demonstrates that the mark's primary significance to the public as a whole is the source, not the product.").

circumstances, as noted before, 'a TLD may render an otherwise descriptive term sufficiently distinctive for trademark registration.' "[61]

Evaluating primary public understanding requires "consideration of the mark as a whole. Even if each of the constituent words in a combination mark is generic, the combination is not generic unless the entire formulation does not add any meaning to the otherwise generic mark."[62] This is well-established law, and "the test for genericness is the same, regardless of whether the mark is a compound term[,] a phrase," or a domain name.[63] Thus, despite the USPTO's assertions to the contrary, Booking.com need not, and does not, ask this Court to overturn *Goodyear's*, or any other precedents for that matter.[64]

B. The proposed per se rule is against the purposes of the Lanham Act and counter to the public interest.

In *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.* this Court explained the purposes of the Lanham Act, writing: "Because trademarks desirably promote competition and the maintenance of product quality, Congress determined that 'a sound public policy requires that trademarks should receive nationally *the greatest protection* that can be given them.' "[65] To advance these

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[61] *In re Steelbuilding.com*, 415 F.3d at 1299 (quoting *In re Oppedahl*, 373 F.3d at 1177). *See also In re Hotels.com, L.P.*, 87 U.S.P.Q.2s 1100 (T.T.A.B. 2008) ("While there is no bright-line rule that appending a top-level domain name such as ".com" to an otherwise generic term will never affect registrability . . . in this case it does not.").

[62] *In re 1800Mattress.com*, 586 F.3d at 1363 (quoting *In re Steelbuilding.com*, 415 F.3d at 1297).

[63] *See Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 966 (Fed. Cir. 2015) (emphasizing that a term must be considered *as a whole* and concluding that it was error to find the mark "pretzel crisps" generic based solely on evidence that the words "pretzel" and "crisp" are generic standing alone).

[64] Brief for Petitioner 100-2 at 11.

[65] *Park 'N Fly*, 469 U.S. at 193 (quoting S.Rep. No. 1333, 79th Cong., 2d Sess., 6 (1946)) (emphasis added).

policy goals, Congress passed the Lanham Act, which "significantly changed and liberalized" trademark law.[66]

The law of trademarks has been described as having twin aims. Namely, it "intends to protect the goodwill represented by marks and the valid property interests of entrepreneurs in that goodwill against those who would appropriate it for their own use. But it likewise protects for public use those commonly used words and phrases that the public has adopted," reserving such words for the "linguistic commons."[67] At times, striking the balance between "the right to protect and the right to use" can create difficult line-drawing problems.[68]

The Lanham Act strikes this balance by allowing protection for descriptive terms upon a showing that the term has acquired secondary meaning and refusing registration to generic terms in all circumstances.[69] Therefore, in any given case, the placement of the line between the generic and descriptive classifications is critically important. The legal standards for making the genericness determination are clear and well-established, as explained in detail earlier. Given the severe consequences that flow from a factual finding of genericness, public policy dictates that each case should be fully considered on its own merits under the controlling legal standards, not disposed of by means of legal short-cuts and imprudent per se rules.

There is no reason to believe that a decision by this Court affirming the Fourth Circuit would result in the anti-competitive consequences the USPTO fears.[70] The existing legal framework is sufficient to preserve generic terms for the linguistic commons and to protect

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[66] *Qualitex*, 514 U.S. at 171 (recognizing the Lanham Act substantially changed the common law of trademarks and noting that the Supreme Court cases cited by respondent interpreted pre-Lanham Act law).
[67] *Am. Online*, 243 F.3d at 821.
[68] *Id*.
[69] *Abercrombie & Fitch*, 537 F.2d at 10.
[70] *See supra* at 7.

against unfair competition. Although the USPTO claims that Booking.com's competitors will be "bar[red] from using their own names"[71] and "deprived of their right to describe their genus of online booking services,"[72] the record contained *no evidence* that these competitors use the term BOOKING.COM either as their name or to describe their services.[73]

The only record evidence the USPTO could possibly point to in support of its assertion consists of eight third-party websites that contain "booking.com" within a longer domain name. Yet this evidence is not helpful because those sites "identify their services not by reference to their domain name but by phrases such as 'Dream Vacation Booking' and 'Vacation Home Booking.' "[74] Further, as both the district court and the Fourth Circuit noted, experience undercuts these concerns. The registration of marks such as "workout.com," "entertainment.com," and "weather.com" as trademarks "has not stopped competitors from using the words 'workout,' 'entertainment,' or 'weather' in their domain names. To the contrary, such related domain names abound and many, such as MIRACLE*WORKOUT.COM*, WWW.GOLIVE-*ENTERTAINMENT.COM*, and CAMPERS*WEATHER.COM*, have actually been afforded trademark protection" themselves.[75]

Existing trademark law affords additional protection against the consequences the USPTO foresees. First, even where a mark consisting of an otherwise unregistrable SLD and a TLD is deemed descriptive, it still can only be registered upon a showing of acquired secondary meaning.[76] If secondary meaning is proven and the mark is registered, the doctrine of fair use is available as protection against an infringement action when "the term charged to be an

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[71] Brief for Petitioner 100-2 at 12.
[72] *Id*. at 13.
[73] *Booking.com*, 278 F.Supp.3d at 921–22.
[74] *Id*.
[75] *Id*. at 911 (emphasis added).
[76] *Two Pesos*, 505 U.S. at 769.

infringement is not used as a trademark 'and is used fairly and in good faith only to describe to users the goods or services of such party[.]' "[77] Further, a plaintiff in an infringement action must prove a "likelihood of confusion," meaning that "the defendant's actual practice is likely to produce confusion in the minds of consumers about the origin of the goods or services in question."[78] As the Fourth Circuit noted, it may be more difficult to meet this standard in cases involving domain names because "domain names are unique by nature and [ ] the public may understand a domain name as indicating a single site . . . ."[79]

This Court has previously recognized that because refusal to register a mark permanently deprives the mark's user of all the benefits of trademark law, a mark should not be refused registration "if it can be avoided by a fair, even liberal construction of the act, designed as it is to promote the domestic and foreign trade of our country."[80] The USPTO's "bright-line rule might foreclose registration to a mark . . . [that] could have otherwise demonstrate[d] distinctiveness" under the appropriate legal analysis.[81] Neither the Lanham Act itself nor the body of case law that has developed on the genericness inquiry mandates the adoption of the USPTO's per se rule. Moreover, the existing structure of trademark law affords sufficient protection of the "linguistic commons" against potential unfair competition. Considering all these factors, and in light of the serious consequences of a genericness finding, it is both unnecessary and inadvisable to adopt legal short-cuts around a full inquiry into primary public understanding.

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[77] *Abercrombie & Fitch*, 537 F.2d at 12 (quoting 15 U.S.C. 1115(b)(4)).
[78] *Booking.com*, 915 F.3d at 187 (internal citations and quotations omitted).
[79] *Id*.
[80] *Estate of P.D. Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538, 546 (1920).
[81] *In re Oppedahl*, 373 F.3d at 1175 (discussing hypothetical domain name "tennis.net" for a company that sells tennis nets).

Applicant Details

First Name	**Nora**
Middle Initial	**R**
Last Name	**Browning**
Citizenship Status	**U. S. Citizen**
Email Address	**browning2024@lawnet.ucla.edu**
Address	**Address** Street **1380 Veteran Ave** City **Los Angeles** State/Territory **California** Zip **90024** Country **United States**
Contact Phone Number	**9287137357**

Applicant Education

BA/BS From	**University of Arizona**
Date of BA/BS	**July 2019**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 22, 2024**
Class Rank	**Not yet ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Criminal Justice Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Saul Lefkowitz Trademark Moot Court Competition** **UCLA Moot Court Honors**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Dolovich, Sharon
Dolovich@law.ucla.edu
(310) 206-5568
Zimmerman, Adam
adam.zimmerman@lls.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nora R. Browning
1380 Veteran Avenue, Los Angeles, CA 90024 • browning2024@lawnet.ucla.edu • 928-713-7357

June 12, 2023

The Honorable Juan Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106

Re: Clerkship Application for 2024-2025 Term

Dear Judge Sanchez:

I am a rising third-year law student at UCLA School of Law and I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I would welcome the opportunity to move to Philadelphia to be closer to my family and experience living in the lively and historic city. I believe I would be an asset to your chambers because of my commitment to public service, experience as a moot court competitor, and demonstrated interest in a wide variety of legal topics. As an aspiring trial and appellate lawyer, it would be a privilege to progress my career as a judicial clerk in your chambers.

My legal research and writing skills will make me a valuable contributor to your chambers. During my first year of law school, I received the Masin Award for excellence in my Legal Research and Writing course. I strengthened these skills as president of the Moot Court Honors Board, where I have engaged with a wide variety of complex legal issues and won awards including Best Advocate, Best Brief, and Best Oral Argument. Further, as the Chief Managing Editor of the *UCLA Criminal Justice Law Review*, I use my attention to detail to ensure every issue is flawless before production.

I am also familiar with courtroom processes. Prior to law school, as a Student Clerk Trainee at the U.S. Attorney's Office, I familiarized myself with criminal court proceedings, witnessing two high-profile trials during my tenure. I have also honed my advocacy skills as a member of the #1 ranked A. Barry Capello Trial Team. During my Summer Associate position at Quinn Emanuel Urquhart & Sullivan, LLP, I will further advance my skills.

Finally, I hope to bring my commitment to public interest work to your chambers. Prior to law school, I provided direct services to families in the Arizona kinship foster care system. This experience helped me learn to communicate and work well with diverse groups of people. Further, as a founder and co-chair of the UCLA Prison Accountability Project, I have advocated for incarcerated people and published findings in the UCLA Covid Behind Bars Database and the Los Angeles Times.

In sum, I believe I will be an asset to your chambers. Attached please find a copy of my résumé, law school transcript, writing sample, and letters of recommendation from Professor Sharon Dolovich and Professor Adam Zimmerman. Thank you for your time and consideration. I look forward to hearing from you.

Respectfully,

Nora Browning

Nora R. Browning

1380 Veteran Avenue, Los Angeles, CA 90024 • browning2024@lawnet.ucla.edu • 928-713-7357

EDUCATION

UCLA School of Law, Los Angeles, CA
J.D. expected May 2024 | GPA: 3.74
Honors: Masin Family Academic Excellence Silver Award in Legal Research and Writing
Moot Court Honors Society
Awards: Roscoe Pound Moot Court Tournament of Champions, *Finalist*
UCLA Law Spring Internal Moot Court Competition, *Best Advocate & Best Brief*
Saul Lefkowitz Trademark Moot Court Competition, *Best Oral Argument & Third Place Overall*
Schrader Pro Bono Program, *Top 20 Pro Bono Contributor*
Activities: Moot Court Honors Board, *President*
Prison Accountability Project, *Co-chair & Co-founder*
A. Barry Capello Trial Team, *Member*
The Ninth Judicial Circuit Historical Society, *Effective Communication Across Differences Participant*
Journal: Criminal Justice Law Review, *Chief Symposium Editor (Vol. 7)*, *Chief Managing Editor (Vol. 8)*

The University of Arizona, Tucson, AZ
B.A., *magna cum laude*, Political Science and Africana Studies (double major), July 2019 | GPA: 3.84
Minors: Spanish, Business Administration
Honors: Dean's List with Distinction, Fall 2017- Spring 2019
School of Government and Public Policy Certificate of Excellence 2019
Study Abroad: University of Havana, Cuba | Universidad Nacional de Costa Rica, Heredia, Costa Rica

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, CA
Summer Associate Expected Summer 2023

Yale Law School, Jerome N. Frank Legal Services Organization, New Haven, CT
Criminal Justice Advocacy and Challenging Mass Incarceration Fellow Summer 2022
- Researched and drafted a memorandum regarding statutes, case law, and customs regulating the use of lawyers in parole eligibility hearings.
- Conducted multidisciplinary research and drafted a memorandum on DNA and crime scene evidence for a death penalty appeal case.

Southwest Human Development, Phoenix, AZ
Family Support Specialist Fall 2020-Fall 2021
- Advocated for legal, financial, medical, and educational resources for families in the child welfare system.
- Prepared court-ready home assessments evaluating the suitability of a child placement.

U.S. Attorney's Office, Tucson, AZ
Criminal Division Student Clerk Trainee Spring and Summer 2019
- Assisted AUSAs by drafting memoranda, organizing case files, and preparing trial exhibits.
- Debriefed with AUSAs after trials and hearings and attended talks regarding laws about immigration, violent crimes, and drug trafficking.

INTERESTS

Enjoy playing volleyball, fine cooking, camping, hiking, and cheering for the Phoenix Suns.

University of California, Los Angeles
LAW Student Copy Transcript Report

Student Information

Name:	BROWNING, NORA R
UCLA ID:	005686217
Date of Birth:	01/09/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 03, 2023 | 06:57:34 AM This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021

SCHOOL OF LAW

Major:
LAW

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 696, 22F

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS	LAW 108A	2.0	0.0	IP
Multiple Term - In Progress				
CRIMINAL LAW	LAW 120	4.0	13.2	B+
PROPERTY	LAW 130	4.0	13.2	B+
CIVIL PROCEDURE	LAW 145	4.0	13.2	B+

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	39.6	3.300

Spring Semester 2022

CONTRACTS	LAW 100	4.0	13.2	B+
LGL RSRCH & WRITING	LAW 108B	5.0	21.5	A+
End of Multiple Term Course				
TORTS	LAW 140	4.0	16.0	A
CONSTITUT LAW I	LAW 148	4.0	13.2	B+
LGL SCHOL & POLICE	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	63.9	3.759

Fall Semester 2022

EVIDENCE	LAW 211	4.0	16.0	A
INTRO FED INCOME TX	LAW 220	4.0	0.0	P
STATE ATTORNEYS GEN	LAW 696	3.0	12.0	A
TRIAL ADVOCACY	LAW 705	4.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	28.0	4.000

Spring Semester 2023

FEDERAL COURTS	LAW 212	3.0	11.1	A-
BUSINESS ASSOCIATNS	LAW 230	4.0	16.0	A
SUPREME COURT SIMUL	LAW 727	2.0	8.0	A
APPELT ADV MOOT CRT	LAW 762	2.0	8.0	A
TRIAL PRACTICE	LAW 798	3.0	12.0	A
ADV TRIAL ADVOCACY	LAW 977	2.0	8.0	A

	Atm	Psd	Pts	GPA
Term Total	16.0	16.0	63.1	3.944

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	10.0	10.0	N/a	N/a
Graded Total	52.0	52.0	N/a	N/a
Cumulative Total	62.0	62.0	194.6	3.742

Total Completed Units 62.0

Memorandum

Masin Family Academic Silver Award
LAWYERING SKILLS, s. H, 22S
RESIDENCE ESTABLISHED 08-10-2022

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

SHARON DOLOVICH
PROFESSOR OF LAW
FACULTY DIRECTOR, UCLA PRISON LAW AND POLICY PROGRAM
FACULTY DIRECTOR, UCLA COVID-19 BEHIND BARS DATA PROJECT

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 206-5568
Email: dolovich@law.ucla.edu

May 10, 2023

Dear Judge:

I write on behalf of Nora Browning, who has applied for a clerkship in your chambers. Nora will make an excellent clerk and I strongly recommend her to you.

I first met Nora in the fall of her 1L year, when she was a student in my criminal law class. The class was large—there were 100 students in the room. But Nora I share a common interest in issues relating to incarceration, and for this reason, she made a point of coming to office hours. And although I've been on sabbatical this year, I have continued to interact with Nora in her capacity as co-Chair of the Prison Accountability Project (on which more below). As a consequence, I have come to know her very well.

I was impressed by Nora from the start. She quickly showed herself to be mature, focused, interested in digging into the issues we were learning in class. As I also learned, she takes initiative. Together with a few of her classmates, Nora launched what has become the Prison Accountability Project (PAP), for which I have served as informal advisor. The Project set itself the goal of framing an advocacy agenda on behalf of people in prison that is grounded in the firsthand experiences of those in custody. I connected Nora and her colleagues with PrisonPandemic.org at UC Irvine, which had been collecting first person testimonials from people incarcerated in California during the pandemic. On their own, they developed a protocol for coding the hundreds of letters and voicemail transcripts PrisonPandemic.org had received. They then recruited fellow students as volunteer coders, oversaw the coding of the entire PrisonPandemic.org archive and built a database of their findings.

That enterprise alone was noteworthy: in my 20+ years of teaching, I have never seen a group of first-semester 1Ls so systematically conceive, strategize, and undertake such a substantive, ambitious, extra-curricular project—and successfully carry it out. But what impressed me still more was the unflagging commitment Nora and her colleagues demonstrated to the venture, how thoughtful they have been throughout the process, and how focused they have remained. Over four semesters, not only has the group—now named the Prison Accountability Project (PAP)—coded and analyzed the UCI data and written an extremely well-crafted report, but they have already developed a protocol for the next phase of their work, which will involve enlisting incarcerated people at CSP Lancaster to share their experiences. The goal is to move past COVID to the general prison experience and to flag for journalists, advocates and policymakers legal issues that may have fallen under the radar. This is an

ambitious undertaking for anyone, much less a small group of law students with plenty of other demands on their time.

I describe the Project in such detail in an attempt to convey the level of maturity, commitment, sophistication, and sheer determination demonstrated by Nora and her co-Chairs. They never drop the ball. They have remained laser-focused. And together they have built an institution at the law school that is not only dedicated to working with and on behalf of deeply underserved constituency but has also helped draw fellow students into the work. This is the definition of leadership, and Nora has been at the heart of the effort from the start.

And somehow, at the same time, Nora has built a law school record that testifies to her impressive skills in legal research, writing, and oral advocacy. Like many first-year law students, Nora took a semester to find her stride. As a consequence, her first semester transcript was undistinguished. But as one might expect from a mature self-starter like Nora, she spent her second semester figuring out what she needed to do differently. These efforts, which included working closely with a study group and developing a feel for the applied nature of legal concepts, paid off handsomely. **Over her first three semesters, Nora's GPA climbed from 3.3 to 3.76 to 4.0.** Perhaps especially noteworthy for a future clerk, she earned **an A+ in Legal Research and Writing**.

Nora has also built an impressive record in moot court, earning honors in competition after competition. I was especially struck by her successes in our (highly competitive) internal moot court competition. Last fall, she was the runner-up for best respondent oral argument. This spring—in keeping with her pattern of outdoing herself— she received the awards for **best overall advocate and best brief**. This spring, in a tribute to her competitive success and her leadership qualities, **she was selected as the incoming President of the UCLA Law Moot Court Board—a position that carries considerable prestige here at UCLAW**.

Nora's academic performance and her moot court honors clearly demonstrate the sharpness of her legal mind, the strength of her legal research and writing skills, and her ability to think on her feet. But they also manifest some of the same qualities reflected in her work with PAP: her drive; her maturity; her professionalism, her ability to recognize when she might need to regroup, and to do just that. All these qualities help explain my certainty that she will make an excellent clerk.

I would be remiss if I neglected to mention what for Nora may be her superpower: her preternatural capacity for time management. During her law school career, Nora has co-Chaired PAP, figured out (and then excelled on) the academic side of things, successfully competed in countless moot court competitions, run the UCLA Criminal Justice Law Review symposium, volunteered with

our Reentry Clinic, drafted a legal memo for our Restorative Justice Legislation Project, and participated in mock trial. I asked her how she has been able to do so much at such a high level. Her answer was planning: she maps out her schedule, as far in advance as necessary, then sticks to it. This capacity may seem more procedure than substance, but as the best lawyers know well, the distinction often blurs. And for a judge looking for a clerk who can effectively handle the challenges of a busy docket or a pressing argument calendar, Nora's ability to manage so many competing demands and yet perform so well should be of great appeal.

I would only add that Nora is a lovely person. She can talk to everyone and is seemingly at ease with anyone whatever their station. She would be a welcome addition to any chambers.

Please do not hesitate to contact me if I can be of any further assistance in this matter. I can be reached via email at dolovich@law.ucla.edu or by phone at 310 206-5568.

Sincerely,

Sharon Dolovich
Professor of Law, UCLA School of Law
Director, UCLA Prison Law and Policy Program
Director, UCLA Covid-19 Behind Bars Data Project

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LOYOLA
LAW SCHOOL | LOS ANGELES

ADAM S. ZIMMERMAN
Professor of Law

Email address: adam.zimmerman@lls.edu
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May 12, 2023

Letter of Recommendation for Nora Browning

Dear Sir or Madame:

I write in enthusiastic support of Nora Browning's application to be your law clerk. Nora was one of my brightest students, writing one of the best exams in my class. Nora possesses all of the qualities and promise of a terrific future law clerk. She is an inquisitive and dedicated scholar. She is top-flight writer, having secured *multiple* awards for her legal writing at UCLA. And Nora possesses a natural intuition for the practical consequences of the law. In short, Nora is a star. I cannot recommend anyone more highly for your chambers.

Nora was a student in my Torts class at UCLA Law, where I was a visiting law professor in the spring of 2022. I teach Torts in a way that integrates elements of legal writing, counseling, negotiation, and oral advocacy. My first year students also often work in-role in my class—as lawyers, administrators, judges, or even clients—to devise strategies and solutions for particular legal problems. Accordingly, I've had the pleasure of observing Nora in many different dimensions as a future lawyer.

Nora was one of my most thoughtful, enthusiastic and devoted students; she's a quick study, approaching every task with sensitivity, detail and a great knack for common law reasoning. One thing that set Nora apart was her intellectual engagement. Students approach my Torts class—which features a very demanding workload—with different attitudes. Nora seized upon the course as an opportunity to become a better law student and lawyer. I could always count on Nora to offer terrific arguments and counterarguments about a particular project, and then, show up in office hours armed with a long-list of difficult, prodding questions about the finer points of the same tort problem we had just discussed in class—from the injustice of a governmental immunity decisions involving victims of domestic violence to nuanced questions about the finer points of the law of preemption. Unsurprisingly, Nora not only received an "A" in my class—and high honors in her writing course—but now currently serves as Chief Managing Editor of the *Criminal Justice Law Review* and ranks among the best students in her class.

It was Nora's gifts at writing and oral advocacy that led me to bring her on to help moot the Yale Law School Veteran's Legal Clinic in a cutting-edge mass tort case currently up for review at the United States Supreme Court. The case, *Skaar v. McDonough*, involves which veterans can participate in a class action against the VA that was filed directly in a federal *appellate* court. That kind of case would ordinarily be way beyond the paygrade of a 1L—it raised complex questions of class action representation, administrative exhaustion, federal court jurisdiction, scientific causation, and appellate procedure. But Nora dove right in. She read all the briefs, reviewed material documents from the

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appellate record, and asked impressive questions of the advocates. The experience helped inspire her to take a job with YLS legal services that summer, where I understand she (characteristically) excelled.

After completing my class, Nora continued to keep in touch. We've met several times over Zoom, for example, to discuss her student note—which focuses on the role of State Attorneys General in providing mass compensation for consumers whose claims are otherwise barred by private arbitration agreements. After one or two sessions discussing her research and honing her thesis, Nora ran with the idea. In just a few weeks, she put together a terrific and original paper. I think it makes a substantial contribution to a topic I've devoted a large part of my career to writing about: the role of public law and enforcement in private compensation.

On a personal note, Nora is compassionate, totally charming, and has a terrific sense of humor. In short, Nora would be a great addition to your chambers, and I can recommend no one more highly than her for a judicial clerkship. Please feel free to contact me by email at adam.zimmerman@lls.edu or by phone at 917-841-5129 if you have further questions.

Very truly yours,

Adam Samuel Zimmerman

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WRITING SAMPLE

The attached writing sample is an excerpt from a brief submitted for the Saul Lefkowitz Trademark Moot Court Competition. The case was brought to the fictional Utopian Court of Appeals and involved a dispute between the internationally famous boy band, BTX, and a small record shop in the state of Utopia called Rex's Records. Rex's Records claimed that BTX violated its trademark "OFF THE CHARTS!" by wearing a costume that said "WE'RE OFF THE CHARTS? YOU BTXCHA!" BTX counterclaimed for false endorsement based on Rex's Records' use of BTX action figures on in-store displays and on the social media site, Speedgram.

The questions presented for the competition were:

1. Did the district court err in finding that "OFF THE CHARTS!" functions as a trademark?

2. Did the district court err in finding no likelihood of confusion?

3. Did the district court err in finding that Rex's Records' use of the BTX action figures constituted false endorsement?

The competition problem existed within a fictional circuit; therefore, competitors were instructed to utilize case law from any circuit. In Utopian courts, the Fair Use Defense is a factor of likelihood of confusion to be considered with six other factors.

My partner and I represented the appellee, BTX. I researched and addressed questions 1 and 2; my partner addressed question 3. I have chosen the likelihood of confusion question as my writing sample. This sample is my own original work product that has not been edited by another person.

II. The District Court Correctly Found There Is Not a Likelihood of Confusion Because Ordinary Consumers Would Not Believe the Marks Are Associated

Rex's Records cannot show that there is a likelihood of confusion between its slogan and BTX's costumes. To prevail, Rex's Records must prove that an appreciable number of relevant consumers acting with ordinary carelessness are likely to be confused as to the affiliation, connection, or association with another mark. 15 U.S.C. § 1125(a)(1)(A); 5 Altman & Pollack, *supra*, § 21:10. Likelihood of confusion means there is a probability of confusion, not a mere possibility of confusion – though actual confusion is not necessary. *Bos. Duck Tours, LP v. Super Duck Tours, L.L.C.*, 531 F.3d 1, 12 (1st Cir. 2008). Under longstanding Utopian law, the pertinent factors in evaluating likelihood of confusion are the (1) strength of the original mark; (2) similarity of the two marks; (3) relationship between the parties' goods or services; (4) relationship between the parties' trade channels; (5) evidence of actual confusion; (6) intent behind the use; and (7) any other factor recognized by Utopian courts – in this case, fair use. These factors are not weighed rigidly, but act as a flexible guide for analysis. *Cohn v. Petsmart, Inc*., 281 F.3d 837, 841 (9th Cir. 2002). Rex's Records presents a case of reverse confusion, where a lesser-known senior user seeks to protect its mark from being overwhelmed by a larger junior user who has publicly saturated the market with a similar mark. *Dreamwerks Prod. Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1130 (9th Cir. 1998). Thus, the specific question presented here is whether a reasonable consumer might purchase items from Rex's Records believing BTX is the source of or associated with the products. *See id.* Rex's Records cannot show this, as not a single factor strongly favors them, and the two most important factors weigh heavily in favor of BTX.

A. Consumers Could Not Find That the Two Marks Are Similar in Appearance, Meaning, or Marketplace Perception

To determine if marks are similar, courts assess the key elements of sight, sound, and

meaning of the mark and consider how it appears in the marketplace. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992). Marks should be reviewed as a whole, as opposed to being broken into their individual components. *Bos. Duck Tours*, 531 F.3d at 29. Taking the marks as a whole, BTX's costume and Rex's Records' slogan are not similar.

First, the appearance of the marks creates distinct commercial impressions. "WE'RE OFF THE CHARTS? YOU BTXHA" is twice as long as "OFF THE CHARTS!" and "BTXHA" is intentionally misspelled to draw attention to the salient part of the mark – BTX. *See Walter v. Mattel, Inc.*, 210 F.3d 1108 (9th Cir. 2000), *holding modified by Surfvivor*, 406 F.3d 625 (finding the marks "Pearl Beach" and "Pearl Beach Barbie" are dissimilar because "Barbie" is the "salient" part of the mark which is "indicative of origin" even if the words and graphics are otherwise the same). Consumers are not likely to be confused as to the origin of a costume that expressly refers to the popular and fashionable band BTX, while the other mark is absent of any notable indicator.

Further, the marks do not look similar. BTX's mark is written in sparkly gold letters created to shimmer in stage lights against the band's plain black T-shirts, enhanced by complimentary gold-striped leather pants and fashionable platform sneakers. (R. at 7). Conversely, "OFF THE CHARTS!" appears as street-style black text on a white background with a black squiggle underneath. (R. at 14). Courts have found comparable differences sufficient to find marks dissimilar. *See Peoples Fed. Sav. Bank v. People's United Bank*, 672 F.3d 1 (1st Cir. 2012) (affirming the finding that two marks were dissimilar where both marks contained the dominant word "People," but one was green text with a yellow horizontal line separating the words, and the other was red and blue with an orbit around the words). This dissimilarity shows there is not a likelihood of confusion.

In addition, consumers encounter the phrases differently in the marketplace. In *Cohn v. Petsmart*, the Ninth Circuit explained that even though two veterinarians used the same slogan, there was not a likelihood of confusion because the slogans were used as a tagline for their house mark (i.e., "Critter Clinic – Where Pets Are Family" and "Petsmart – Where Pets Are Family"). 281 F.3d at 842. While not a house mark, displaying BTX's phrase exclusively across the chest of the bandmates functions in the same way to show origin. Equally, Rex's Records uses the slogan in conjunction with its house mark in every instance – on the storefront, on the website, on merchandise, and on social media. Like *Cohn v. Petsmart*, the phrases are perceived differently in the marketplace because they are attached to other source identifiers, so there is not a likelihood of confusion.

Finally, the meanings of the slogans are dissimilar. BTX's costumes are inspired by "the band's enormous popularity and chart-topping success all over the globe." (R. at 7). Rex's Records' slogan was made to show that "Rex's Records was not old and stuffy, and instead that it was new and had the best new music." (R. at 7). While BTX's costume plays into their own chart-topping success, which is well known to the fans at their sold-out arena concerts, Rex's Records' slogan seeks to convey that it sells new music. One is self-laudatory; the other is an advertisement. Thus, the meanings behind the slogans are different and there is not a likelihood of confusion.

Reliance on *E. & J. Gallo Winery* for this factor is weak. 967 F.2d at 1280. While the Court in that case found that the marks appeared similar, the most important element of the trademarks was the shared name, "Gallo." *Id.* at 1290. This was because the name had a strong secondary meaning as the name of the best-selling wine brand in the country. *Id.* at 1285. Here, the shared element of "off the charts" is not the most important element – BTX is. Further, neither of the

marks has attained the level of recognition that "Gallo" has, so there is less of a chance of confusion. Thus, this case does little to support the appellant's argument, and any overlap in the two marks is well within a finding of no likelihood of confusion. *See Bos. Duck Tours*, 531 F.3d at 29 (finding "Boston Duck Tours" and "Super Duck Tours" dissimilar despite the use of the same dominant word, emphasizing the marks as a whole may still create distinct commercial impressions, especially if similarities are generic or descriptive elements).

B. The Parties Do Not Share Trade or Advertising Channels, and Consumers Would Purchase the Products While Exercising a High Degree of Care

This factor considers where the goods or services are sold, the sales and marketing methods employed, and the class of purchasers exposed to the marketing efforts. *Cohn*, 281 F.3d at 842. A finding that customers exercise a high degree of care, such as when items are expensive or purchased after careful consideration, makes confusion less likely. *Playboy Enters. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1028 (9th Cir. 2004).

BTX's costumes are not sold or marketed in the same channels as Rex's Records' "OFF THE CHARTS!" products. Rex's Records is a retail store and website, but customers see the BTX costumes in concerts. The fact that Rex's Records sells BTX's music is not a strong argument, as courts require a closer trade channel connection than this. *See Kibler v. Hall*, 843 F.3d 1068, 1080 (6th Cir. 2016) (finding evidence that two artists play at the same venue would not lead consumers to confuse the artists because one was a rapper and the other a DJ). Thus, this factor also weighs against finding a likelihood of confusion.

While Rex's Records argues that the marketing and trade channel at issue is Speedgram, this does not help its argument. First, Rex's Records has not displayed its slogan on its Speedgram except for one hashtag which was buried in a pile of six other hashtags. Thus, even if consumers perceived BTX's costumes on Speedgram, they have not meaningfully perceived Rex's Records'

slogan. Further, Rex's Records has not provided any evidence that a search of "off the charts" on Speedgram would return results for both Rex's Records and BTX. *See Wreal, L.L.C. v. Amazon.com, Inc.*, 38 F.4th 114, 124 (11th Cir. 2022) (finding the modes of trade were not similar even though both companies used internet stores because consumers would only find both stores next to each other if they conducted a google search). Second, this formation of a whole social website as the "marketplace" is overbroad and would result in this factor providing little probative value. *See Playboy*, 354 F.3d at 1028 ("Given the broad use of the Internet today...this factor merits little weight"). The only commercial enterprise related to the shirts is the actual concert at which the shirts are seen; thus, Rex's Records' argument fails, and there is still not a likelihood of confusion.

Additionally, the class of consumers makes confusion unlikely, as people would exercise a high degree of care when purchasing concert tickets to see BTX perform, which is where they would see the costumes. Fans would be heartbroken to find that after spending hundreds of dollars to see their favorite band, they accidentally purchased tickets for a cover band or for the wrong day. Further, based on the band's young fanbase and the price of concert tickets for the sold-out shows, it is more likely that guardians of fans are purchasing the tickets, and they would exercise a high degree of care in ensuring their children are going to the right event. *See Cohn*, 281 F.3d at 843 (finding pet owners would be particularly attentive in selecting a veterinarian, and thus are likely to perceive the differences between two marks). Thus, the class of consumers weighs against finding a likelihood of confusion.

Any reliance on *Dreamwerks* does not help Rex's Records' argument. 142 F.3d at 1131. There, the Ninth Circuit found that consumers might associate Dreamwerks' conventions (a niche gathering of Star Trek fans) with DreamWorks studios (an entertainment goliath). *Id.* The

ultimate issue was whether the larger junior user, DreamWorks, could conceivably host a sci-fi convention – a reasonable conclusion from the studio which made *Jaws*, *E.T.*, and *Jurassic Park*. *Id.* This was largely because entertainment studios control all sorts of related industries: "publishing, clothing, amusement parks, computer games and an endless list of toys and kids' products." *Id.* That is not the situation here. While musical artists open their own merchandise stores and sell their own products, it is not reasonable to think that they would open a single-location music store that sells products from an array of other Top-100 artists. Consumers would not believe Macy's is owned by Calvin Klein or Spotify is owned by Taylor Swift; but they might believe a Princess-themed amusement park is owned by Disney. Thus, *Dreamwerks* is differentiable because it is reasonable for a movie studio to host a sci-fi convention, but it is not reasonable for a boy band to open a store to sell other artists' merchandise. Therefore, there is still not a likelihood of confusion.

C. Because Rex's Records' Mark Is Weak but BTX's Market Recognition Is High, the Strength of the Mark Is Neutral

Determining the strength of a mark depends on its commercial strength (the extent to which the mark has been advertised and there is market recognition) and conceptual strength (the level of distinctiveness). *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 230-31 (3d Cir. 2000) In reverse confusion cases, courts compare the commercial strength of the junior mark against the conceptual strength of the senior mark. *Wreal*, 38 F.4th at 131. High junior commercial strength supports a finding of confusion, but low senior conceptual strength does the opposite. *A&H*, 237 F.3d at 231.

Rex's Records' mark is descriptive and laudatory, and thus conceptually weak. *See supra* Section I.a. BTX is extremely popular and has benefited from the free publicity of fans sharing pictures of the costumes on Speedgram. *See A&H*, 237 F.3d at 237 (noting that free publicity, not

just intentional advertising, is considered for commercial strength). Thus, the commercial strength of BTX's mark favors Rex's Records. In cases where the two aspects of this factor conflict, courts have found it to have less probative value. *See Attrezzi, L.L.C. v. Maytag Corp.*, 436 F.3d 32, 40 (1st Cir. 2006). Thus, this factor does little to determine whether there is a likelihood of confusion.

D. Little Weight Is Afforded to the Relationship Between the Goods or Service Sold in Cases Where the Products Do Not Compete Directly

Courts are divided on how to analyze the relationship between goods. The Sixth Circuit holds that if the products are somewhat related, but do not compete directly, the relationship between them is less important than other factors. *Kibler*, 843 F.3d at 1076 (finding this factor was neutral as a rapper and DJ who share the name "Logic" are not direct competitors because they are in different genres). The Ninth Circuit considers whether the goods are complementary, sold to the same class of purchasers, or similar in use or function. *Walter*, 210 F.3d at 1111 (finding beach-themed illustrations for product packaging are not complementary to a beach-themed Barbie). The Eleventh Circuit considers whether consumers might expect the defendant to "bridge the gap" and enter the plaintiff's market. *Wreal*, 38 F.4th at 132 (finding consumers would expect Amazon to add hardcore pornography to its streaming service where they already sell it on Amazon.com and stream softcore pornography). However, it is not necessary for this Court to adopt a certain test, as the goods here are not similar under any test.

Under the Sixth Circuit's test, there is no similarity of goods because the products do not compete directly. BTX does not sell their signature costumes which contain the mark, and Rex's Records does not sell tickets to BTX concerts to see the costumes. For similar reasons, there is no finding of similarity under the Ninth Circuit's test. BTX's costumes are not for sale and are not similar in use or function to anything in Rex's Records' store because they cannot be

purchased like Rex's Records' shirts. They are also not complementary, because even though Rex's Records sells CDs of music, nothing in his store is related to costumes or live music, which is where BTX's mark appears. Finally, consumers would not expect the defendant to "bridge the gap" into selling Rex's Records' goods because they would not believe that a famous boy band opened a single-location music store that sells CDs of other artists. Thus, this factor, while carrying little weight, does not support a finding of likelihood of confusion.

E. There Is No Evidence of Intent to Derive Benefit from Rex's Records' Mark

Intent is largely irrelevant in reverse confusion cases because "the defendant by definition is not palming off or otherwise attempting to create confusion as to the source of the product" *Quaker Oats*, 978 F.2d at 961. In the rare instance when intent is relevant, courts require that a defendant knew of the mark, should have known of the mark, intended to copy the mark, failed to conduct a reasonably adequate trademark search, or otherwise culpably disregarded the risk of reverse confusion. *Marketquest Grp., Inc. v. BIC Corp.*, 862 F.3d 927, 934-35 (9th Cir. 2017). Rex's Records has offered no evidence that BTX is guilty of any such bad faith. As the band did not intend for the mark to act as a trademark, there would have been no reason to conduct a trademark search; even still, Rex's Records offers no evidence that a trademark registry search of "WE'RE OFF THE CHARTS? YOU BTXHA!" would return Rex's Records' slogan. Thus, this factor does not support finding a likelihood of confusion.

F. There Is No Evidence of Actual Confusion Because the Survey Is Irrelevant

Evidence of actual confusion, or lack thereof, generally has little probative weight in reverse confusion cases because of the difficulty of proving this factor. *Cohn*, 281 F.3d at 842. The survey which Rex's Records offered as evidence of secondary meaning has no bearing on this factor, as that survey sought (though ineffectively) to determine consumer recognition of their own mark, not consumer confusion with BTX's. *See Parks*, 863 F.3d at 232 (explaining that an

appellant cannot make a survey "do double duty" by proving both secondary meaning and likelihood of confusion). Thus, this factor does not help Rex's Records meet its burden.

G. BTX's Strong Claim of Fair Use Shows That It Is Equitable to Continue to Use the Costumes, Even if There Is Some Confusion Between the Marks

The Supreme Court of the United States has acknowledged that likelihood of confusion is a factor of the fair use defense. *See KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004). Some consumer confusion is expected in fair use because the appellant assumes some risk of confusion by choosing to identify himself with a well-known descriptive phrase. *Marketquest Grp.*, 862 F.3d at 937. Though the fair use defense only becomes relevant after likely confusion is proven, the fact that BTX has a strong fair use claim shows that it is equitable to allow BTX to continue using their costumes. *See KP Permanent,* 543 U.S. at 125. To assert the fair use defense, a junior user must show that (1) its use is other than a trademark, (2) it is descriptive of its goods, and (3) it is in good faith. *Id.* at 118. BTX only needs to show they used the phrase other than as a trademark as they have already established the other two elements. *See supra* Section I.a; Section II.e.

BTX does not use the phrase as a trademark. *Compare SportFuel, Inc. v. PepsiCo, Inc.*, 932 F.3d 589, 598 (7th Cir. 2019) (finding "The Sport Fuel Company" was not used as a trademark because it primarily served as a tagline to the house mark "Gatorade" on store displays and advertisements and because the company disclaimed exclusive use of the phrase for being descriptive) *with Quaker Oats*, 978 F.2d at 954 (finding "Thirst-Aid" functioned as a trademark as it was an "attention-getting symbol" for Gatorade because of its rhyming quality and it was featured more prominently and in a larger font than the house mark on promotional material). WE'RE OFF THE CHARTS? YOU BTXHA!" is used like "The Sport Fuel Company" because it is used in conjunction with BTX's house mark on the costumes, which have the exhibition

effect of an in-store display or advertisement. BTX has also never claimed to use the phrase as a trademark or asserted exclusive use of the phrase. The only part of the phrase that is a trademark is BTX – the rest is laudatory and does not act as a source indicator. Unlike *Quaker Oats*, the phrase is in the same size and font as the house mark and does not have the rhyming catchiness of "Gatorade is Thirst-Aid." While Rex's Records may argue that the misspelled "BTXHA" functions in the same way as a rhyme, misspellings do not inspire mental recall as much as rhymes, and misspelling a word does not necessarily add distinctiveness to a phrase. 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 11:31 (5th ed. 2022). Thus "WE'RE OFF THE CHARTS? YOU BTXHA!" is not used as a trademark and BTX is entitled to the fair use defense, meaning some consumer confusion is permissible.

H. An Aggregate Assessment of the Factors Shows That There Is Not a Likelihood of Confusion and the District Court's Decision Should Be Affirmed

When balancing the factors, the appropriate weight given to each factor varies with the circumstances of the case. *Wreal*, 38 F.4th at 127. The similarity of the marks is generally one of the most important. *Packman*, 267 F.3d at 645. Evidence of actual confusion, intent to derive benefit from the senior mark, the strength of the marks, and the relationship between the goods offer little weight to this analysis. The remaining factor relating to trade and marketing channels heavily favors BTX. Thus, an aggregate assessment shows that there is no likelihood of confusion – a finding which is consistent with other courts' conclusions. *See id.* at 646 (affirming a finding of no likelihood of confusion where the same slogan was visually distinct and used in different trade channels, and all other factors offered little weight); *see also Peoples Fed.*, 672 F.3d at 17. Finally, even if the court found some factors in favor of the appellant, BTX's strong showing of fair use should tip the balance towards a finding of no likelihood of confusion. This supports the underlying principle of trademark law that no person should be able to appropriate

descriptive language through trademark registration. *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 529 (1924). Thus, the district court's finding of no likelihood of confusion should be affirmed.

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